United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

77-1001

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1001

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

MATTHEW MADONNA AND SALVATORE LARCA,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' JOINT APPENDIX

EDWARD BENNETT WILLIAMS
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Attorneys for Defendant-Appellant, Madonna
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(202) 331-5000

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New York, New York 10022
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UNITED STATES COURT OF APPEALS
FILED
FEB 14 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

PAGINATION AS IN ORIGINAL COPY

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A 1

MADONNA, MATTHEW a/k/a
Paul DeRobertis

U.S. CODES	OFFENSES CHARGED	COUNTS
21:846	Consp. to viol. Fed. Narco. Laws.	1
21:812,841	Distr. & possess. of Heroin I.	2

100,
8/25/76

II. KEY DATES & INTERVALS

ARREST of 8/20/76 5:30 P.M. | INDICTMENT X | Information 8-27-76 | ARRAIGNMENT 8-31-76 | TRIAL 11-1-76 | SENTENCE 11-16-76 12-21-76

Indict Waived | Superseding | Plea to 8-31-76 | Trial Ended 11-16-76 | Dismissed | Acquitted | Dismissed | On Government's Motion

MAGISTRATE

	DATE	INITIAL NO.
Search Warrant Issued / Return		
Summons Issued / Served		
Arrest Warrant Issued		
COMPLAINT	8/21/76	MDJ-08AB
OFFENSE (Complaint)		

INITIAL APPEARANCE DATE 8/21/76
PRELIMINARY EXAMINATION OR REMOVAL HEARING: Date Scheduled 8/31/76 / Date Held
WAIVED / NOT WAIVED
GRAND JURY/INTERVENING INDICTMENT
Type Number
INITIAL NO. MDJ-08AB

OUTCOME
DISMISSED
HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT
HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW

21 USC 812,841(a)(1) and 841(b)(1)(A) - NARCOTICS

U.S. Attorney or Asst.
Don D. Buchwald
791-0069

ATTORNEYS (Def'n'd's CJA Ret. Waived Sel. Nonc / Other PD. Co.)
Gustave H. Newman
522 5th Ave.
New York, NY
682-1066

Gerald Alch %
Robert Bloomer
250 Bway N.Y.C 571-0805

21/

* Show last names and suffix numbers of other defendants on same indictment/information

01-BORIELLO, 03-MADONNA

DATE	PROCEEDINGS (DOCUMENT NO.)	EXCLUDABLE DELAY (a) (b) (c) (d)
8/21/76	Complaint filed, represented by Gustave H. Newman, Esq., 522 - 5th Ave., N.Y. Defendant remanded into the custody of U.S. Marshal in lieu of $650,000 cash or surety.	
8/24/76	On application of defendant's attorney, bail modified to $100,000 cash or surety by Hon. Henry F. Werker, USDJ.	
8/25/76	Defendant released on bail, address: 1189 Rhinelander Ave., Bx., N.Y. Bail made with Midland Ins. Co, 85 Baxter St., N.Y. Defendant to surrender passport to U.S. Attorney.	
8/27/76	Indictment filed, 76 Cr. 846	
8-31-76	Deft. (Atty. present) enters a not guilty plea. Case assigned to Judge Carter for all purposes. 10 days for Motions. Bail is set in the amount $100,000. Cash or Surety. Bail application by Government to increase Bail to $250,000. Cash or Surety to be posted by noon. Werker,J	
9-1-76	Filed Notice of Appearance of Atty, Gustave H. Newman,	
9-1-76	Filed Appearance Bond in the amount of $100,000.00 dated 8-25-76. Name of Surety: Midland Ins. Co.	
9-7-76	Pre-Trial Conference held. All pre-trial motions to be filed by Sept 13, 1976. Govt to file response by Sept 17, 1976. Trial will be set down for as early as Nov 1, 1976. Bail application by the Govt as to Deft; Decision Reserved. Deft cont'd on bail....CARTER,J.	

(Cont'd on Page #2)

	Filed [illegible] Bond in the amount of $100,000.00. [illegible] Ins. Co. acknowledged by the Clark.
[illegible]-76	Filed Deft's [illegible] Bond in the amount of $50,000.00, [illegible] Ins. Co. of Madonna, acknowledged by the Clark.
[illegible]-76	Filed "ROUTINE" issued 9-3-76.
9-13-76	Filed deft's notice of motion for an order granting discovery and inspection, and requiring the Government to prepare and serve a Bill of Particulars.
9-13-76	Filed defts notice of motion for an order suppressing evidence seized by the Government wich it will attempt to utlize at trial and severing the deft Madonna's case fro that of his co-deft. Boriello, and dismissing the indictment.
9-23-76	Fld deft Madonna affid in support of his argument for the continuance of the current bail
9-23-76	Fld deft addendum to affid
9-24-76	Fld envelope sealed by order of the Court....Carter,J. (placed in cashiers vault)
9-23-76	Fld motion of Gerald Alch, Esq for admission Pro Hac Vice
9-24-76	Fld memo end on motion fld9-23-76 Application Granted so ordered Carter,J. M/M
9-30-76	Filed Deft's Certificate of Service re: Motion for Discovery, Admission of Polygraph Test, Disclosure, & Severance, delivered by hand to U.S.Atty for the S.D.of NY, Stephen Russo, Esq., Alan C. Lippel, Esq, and Murray Richman, Esq....
9-30-76	Filed Deft's Motion & Memorandum of Law for Discovery & Inspection, Ect.
9-30-76	Filed Deft's Motion for the Admission of Polygraph Test.
9-30-76	Filed Deft's Motion for Disclosure.
9-30-76	Filed Deft's Motion for Severance.
9-30-76	Filed Deft's Memorandum of Law in support of an application for Polygraph Evidence.
9-30-76	Filed Deft's memorandum of Law in support of Motion for Severance.
9-30-76	Filed Affdvt of Cerald Alch, Atty for Deft, stating that he went to the MCC in order to see Deft Boriello for the purpose of him signing an affdvt.
10-4-76	Fld memo end on motion fld 9-13-76. Motion disposed of as indicated on the record of Sept 24,1976 So ordered Carter,J. M.N
10-4-76	Fld memo end on motion fld on 9-13-76. Motion disposed of as indicated on the record of Sept 24,1976...So ordered Carter,J. M/N
10-13-76	Filed Deft's Notice of Motion for Trial Continuance.
10-13-76	Filed Deft's Memorandum of Law in support of his motion for continuance of the trial date.
10-13-76	Filed Affdvt of John P. Flannery, AUSA, in opposition to Deft's requests for discovery and Bill of Particulars.
10-18-76	Filed Deft's affdvt & Motion for Pre-Trial production .
10-18-76	Filed Deft's Memorandum of Law in support of motion for Pre-Trial Discovery.

continued on page#3

DATE	PROCEEDINGS	CR NUMBER	DATE	PROCEEDINGS NUMBER	CR NUMBER

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[illegible]	Filed Deft's [illegible] bond in the amount of $100,000.00. [illegible] Ins. Co. acknowledged by the Clerk.
[illegible]	Filed Deft's [illegible] bond in the amount of $50,000.00, [illegible] Madonna, acknowledged by the Clerk.
[illegible]	Filed [illegible] dated 9-3-76.
9-13-76	Filed defts. notice of motion for an order granting discovery and inspection, and requiring the Government to prepare and serve a Bill of Particulars.
9-13-76	Filed defts notice of motion for an order suppressing evidence seized by the Government wich it will attempt to utlize at trial and severing the deft Madonna's case fro that of his co-deft. Boriello, and dismissing the indictment.
9-23-76	Fld deft Madonna affid in support of his argument for the continuance of the current bail
9-23-76	Fld deft addendum to affid
9-24-76	Fld envelope sealed by order of the Court....Carter,J. (placed in casniers vault)
9-23-76	Fld motion of Gerald Alch, Esq for admission Pro Hac Vice
9-24-76	Fld memo end on motion fld9-23-76 Application Granted so ordered Carter,J. M/M
9-30-76	Filed Deft's Certificate of Service re: Motion for Discovery, Admission of Polygraph Test, Disclosure, & Severance, delivered by hand to U.S.Atty for the S.D.of NY, Stephen Russo, Esq., Alan C. Lippel, Esq, and Murray Richman, Esq....
9-30-76	Filed Deft's Motion & Memorandum of Law for Discovery & Inspection, Ect.
9-30-76	Filed Deft's Motion for the Admission of Polygraph Test.
9-30-76	Filed Deft's Motion for Disclosure.
9-30-76	Filed Deft's Motion for Severance.
9-30-76	Filed Deft's Memorandum of Law in support of an application for Polygraph Evidence.
9-30-76	Filed Deft's memorandum of Law in support of Motion for Severance.
9-30-76	Filed Affdvt of Gerald Alch, Atty for Deft, stating that he went to the MCC in order to see Deft Boriello for the purpose of him signing an affdvt.
10-4-76	Fld memo end on motion fld 9-13-76. Motion disposed of as indicated on the record of Sept 24,1976 So ordered Carter,J. M.N
10-4-76	Fld memo end on motion fld on 9-13-76. Motion disposed of as indicated on the record of Sept 24,1976...So ordered Carter,J. M/N
10-13-76	Filed Deft's Notice of Motion for Trial Continuance.
10-13-76	Filed Deft's Memorandum of Law in support of his motion for continuance of the trial date.
10-13-76	Filed Affdvt of John P. Flannery, AUSA, in opposition to Deft's requests for discovery and Bill of Particulars.
10-18-76	Filed Deft's affdvt & Motion for Pre-Trial production .
10-18-76	Filed Deft's Memorandum of Law in support of motion for Pre-Trial Discovery.

continued on page#3

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DATE	PROCEEDINGS
11-15-76	Fld memo end on motion fld 11-1-76 Motion denied as indicated on the record So ordered Carter,J. M/N
11-15-76	Fld memo end on motion to suppress fld 11-1-76. Motion denied as indicated on the record....So ordered Carter,J. M/N.
11-15-76	Fld memo end on motion to deny admission fld 11-1-76 Motion denied as indicated on the record.... So ordered Carter,J. M/N
11-15-76	Fld memo end on motion fld 10-26-76 Motion denied As indicated on the record.. Carter,J.
11-16-76	Filed NOTICE OF APPEAL to the USCA, by the deft. from the order of Judge Carter, dated 11-16-76. m/n US Atty & Deft.
11-22-76	Filed Gov't's proposed examination of proposed jurors.
11-3-76	Filed Deft's Memorandum of Law in support of motion to suppress evidence of prior sumilar act.
11-26-76	Filed Govts' Memorandum Of Law In Support Of Evidence Of A Prior Criminal Act.
9/23/76	Filed letter of G. H. Newman to the Judge (Change of Atty)
11-29-76	Filed True Copy of the Mandate of the USCA affirming the order of the District Court. True Copy signed, A.D. Fusaro, Clerk, m/n.
12-3-76	Fld Defts' Notice of Motion For Judgement of Acquittal or New Trial.
12-3-76	Fld Defts Madonna & Larca's Memorandum of Law in support of Motion for Judgement of Aqcuittal or New Trial.
12-17-76	Fld Gov'ts Memorandum of Law in opposition to defts' Post Trial Motions.
12-21-76	Filed JUDGMENT #_____ and PROBATION/COMMITMENT ORDER - the deft is hereby committed to the custody of the Atty Gen, for impri for a period of FIFTEEN (15) YEARS on count 1 and the deft is fined $25,000 on count 1, the deft is ordered to stand committed until the fine is paid or he is otherwise discharged according to law. FIFTEEN (15) YEARS on count 2 and the deft is fined $25,000 on count 2, the deft is ordered to stand committed until the fine is paid or he is otherwise discharged according to law. Sentence on Count 2 is to run CONSECUTIVELY to sentence on Count 1. Total Fine to be paid is $50,000. Pursuant to the provisions of Title 21, USC, Sec. 841 the deft is placed on special parole for a peciod of three (3) years, to commence upon the expiration on confinement. So ordered Carter, J. Certified copies issued.
12-22-76	Filed MEMO-ENDORSED on deft motion for judgment of acquittal or new trail filed 12-3-76 - Motion denied in open court. So ordered ,...CARTER,J. m/n.
12-21-76	Filed Courts Exhibit # 1.
12-14-76	Filed transcript of record of proceedings, dated
12-14-76	Filed transcript of [illegible] dated (Dec 24, 25, 26)(Sept 2, 3, 24)(Oct 5, 6, 18, 19 20) 1976
12-14-76	Filed transcript of [illegible] dated Dec 2, 3 1976
12-28-76	Filed transcript of [illegible] dated Nov 8, 9, 10, 1976
12-29-76	Filed transcript of [illegible] dated (Nov 4, 10, 15, 16) (Dec 21, 1976)
12-29-76 by	Filed NOTICE OF APPEAL to the USCA from the judgment of conviction filed 12-21-76, the deft. m/n.

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0208 01

02 - LARA, SALVATORE

08 27 76 0846 02

21 USC SECTION(S)	OFFENSES CHARGED	COUNTS
21:846	Consp. to viol. Fed. Narco. Laws.	1
21:812, 841	Distr. & possess. of Heroin I.	2

SUPERSEDING COUNTS

U.S. DIST. CASE NO. 76-964

$100,000 Bail

8/25/76 X

Bail Not Made

Status Changed (See Docket)

3rd Party Custody

Other

II. KEY DATES & INTERVALS

ARREST or	INDICTMENT X	ARRAIGNMENT	TRIAL	SENTENCE
8/20/76 5:30 p.m. Summons Served	Information 8-27-76	8-31-76	Trial Began 11-1-76	11-16-76 / 12-21-76
First Appearance	Indict. Waived	1st Plea 8-31-76	Trial Ended 11-16-76	X Convicted X On All Charges
	In Charging District	Final Plea		Acquitted

MAGISTRATE

	DATE	INITIAL	
Search Warrant Issued / Returned			
Summons Issued / Served			
Arrest Warrant Issued			
COMPLAINT ▶	8/21/76	MDJ-08AB	
OFFENSE (Complaint)	21 USC 812,841(a)(1) and 841(b)(1)(A) - NARCOTICS		

INITIAL APPEARANCE 8/21/76

PRELIMINARY EXAMINATION / REMOVAL HEARING 8/31/76

WAIVED X NOT WAIVED

INTERVENING INDICTMENT

MDJ08AE

OUTCOME

DISMISSED

HELD FOR GJ OR OTHER PROCEEDINGS IN THIS DISTRICT

HELD FOR GJ OR OTHER PROCEEDINGS OUTSIDE THIS DISTRICT

U.S. Attorney or Asst.

Don D. Buchwald
791-0069

ATTORNEYS Retained / Appointed / Waived / Self / Other

Murray Richmond
501 5th Ave.
New York, NY
878-1360

Show last names and suffix numbers of other defendants on same indictment/information

01 - BORIELLO, 02-MADONNA

DATE	DOCUMENT NO.	EXCLUDABLE DELAY
8/21/76	Complaint filed, represented by Murray Richman, Esq., 501 - 5th Ave, N.Y. Defendant remanded into the custody of U.S. Marshal in lieu of $350,000 cash or surety.	
8/24/76	On application of defendant's attorney, bail modified to $100,000 cash or surety by Hon. Henry F. Werker, USDJ.	
8/25/76	Defendant released on bail, address: 2215 Belmont Ave., Bx., N.Y. Bail made with Midland Ins. Co, 85 Baxter St., N.Y.	
8/27/76	Indictment filed, 76 Cr. 846	
8-31-76	Deft. (Atty present) enters a not guilty plea. Bail is set in the amount of $100,000 Cash or Surety. Case assigned to Judge Carter for all purposes. Werker, J	
9-1-76	Filed Notice of Appearance of Atty, Murray Richmond.	
9-1-76	Filed Appearance Bond in the amount of $100,000.00 dated 8-25-76. Name of Surety: Midland Ins. Co.	
9-7-76	Pre-trial conference held. All pre-trial motions to be filed by Sept 13, 1976. Govt to file respond by Sept 17, 1976. Trial will be set down for as early as Nov 1, 1976. Bail application by the Govt as to the Deft: Decision Reserved. Deft cont'd on Bail.....CARTER, J.	

-76	Filed defts. motion for discovery and inspection and for a Bill of Particulars and for an order to produce and to supress and to dismiss the indictment....
10-4-76	Fld memo end on motion fld 9-13-76. Motion disposed of as indicated on the record of Sept. 24, 1976 So Ordered Carter, J. M/N
10-13-76	Filed Deft's motion for Trial Continuance.
10-23-76	Fld Govt's Memo in oppsoition to deft's discovery reqs etc.
9-23-76	Fld " Addvt. " " " " " " " "
10-20-76	Fld endorsement on motion fld 10-13-76-motion is totality w o substance and is denied...So ORdered...Carter, J. mn
10-26-76	Filed Govt's Bill of Particulars.
11-1-76	Fld Govt's Proposed examination of Proposed Jurors.
11/10/76	Filed Defts Memorandum of law to exclude evidence of a prior crinal act. Filed Requested instrustions of deft.
11-1-76	Jury Trial begun
11-3-76	T ial cont'd
11-4-76	" " "
11-5-76	" " "
11-8-76	" " "
11-9-76	" " "
11-10-76	" " "
11-11-76	" " "
11-12-76	" " "
11-15-76	T ial cont'd- Jury Deliberates
11-16 76	Jury continues deliberating- Jury verdict reached at 9:30 A.M. Deft guilty as to cts 1&2 Remanded pending sentence without bail ....Carter.J.
11-18-76	Filed NOTICE OF APPEAL to the USCA, by the deft. from the order of Judge Carter, J. dated 11-16-76. M/N USAtty, & Deft.
11-22-76	Filed Govt's proposed examination of proposed jurors.
11-26-76	Filed Govts' Memorandum of Law in Support Of Evidence Of A Prior Criminal Act.
11-29-76	Filed TRUE COPY of the USCA Mandate affirming the decision of the District Court. A.D. Fusaro, Clerk. m/n.
12-3-76	Fld Defts' Notice of Motion For Judgement of Acquittal or New Trial.
12-3-76	Fld Defts' Madonna & Larca's Memorandum of Law in Support of Motion for Judgement of Acquittal or New Trial.
12-17-76	Fld Govt's Memorandum of Law in Opposition to Defts' Post Trial Motions.

CONTINUED on page 3.

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U.S. vs LARSA, SALVATORE

DATE	PROCEEDINGS	No.
12-21-7	Filed JUDGMENT AND PROBATION / COMMITMENT ORDER - THE deft is hereby committed to the custody of the Atty Gen. for impr. for a period of FIFTEEN (15) YEARS on Count 1. FIFTEEN (15)YEARS on count 2, to run concurrently with sentence on count 2, to run concurrently with sentence on count 1. Pursuant to the provisions of Title 21 Title USC, Sec 841 the deft is placed on special parole for a period of THREE (3) YEARS, to commence upon the expiration of confinement. So ordered CARTER, J. All copies issued.	
12-22-76	Filed MEMO-ENDORSED on deft motion for judgment of acquittal or new trial filed 12-3-76 - Motion denied in open court. So ordered! .... Carter, J. m/n.	
12-23-76	Filed NOTICE OF APPEAL to the USCA by the deft., from the Judgment and Commitment entered against him on 12-21-76. m/n.	
	Filed transcript of record of proceedings, dated Nov 21, 23 & 31, Sept 2, 23 & Oct 5, 6, 18, 20 & -	
	Filed transcript of record of proceedings, dated Nov 15, 4 & 5 - 1976	
	Filed transcript of record of proceedings, dated Nov 8, 9 & 10 - 1976	
	Filed transcript of record of proceedings, dated Nov 10, 12, 15 & 16 - 1976	

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76 CRIM. 0846

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA :

- v - :

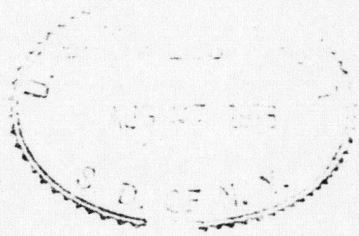
MATTHEW MADONNA, a/k/a Paul DeRobertis, SALVATORE LARCA, JOSEPH BORIELLO, JOSEPH FLORIO and RICHARD KLINGER, :

Defendants. :

- -x

INDICTMENT

76 Cr.



COUNT ONE

The Grand Jury charges:

1. From on or about the 1st day of May, 1976, and continuously thereafter up to and including the date of the filing of this Indictment, in the Southern District of New York, MATTHEW MADONNA, a/k/a Paul DeRobertis, SALVATORE LARCA, JOSEPH BORIELLO, JOSEPH FLORIO and RICHARD KLINGER, the defendants and others to the Grand Jury known and unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1), 841(b)(1)(A) and 952(a) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants and co-conspirators unlawfully, intentionally and knowingly would import into the United States from other countries and distribute and possess with intent to distribute Schedule I narcotic drug controlled substances,

the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1), 841(b)(1)(A) and 952(a) of Title 21, United States Code.

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York and elsewhere:

1. On or about July 12, 1976, defendant JOSEPH FLORIO in California spoke on the telephone with co-conspirator Eugene Travers ("Travers") in the Bronx, New York, and asked Travers if he would deliver heroin to New York from outside the country;

2. On or about July 13, 1976, defendant RICHARD KLINGER in California spoke on the telephone with co-conspirator Jan Portman ("Portman") in Florida and asked Portman if she would bring heroin into the country;

3. On or about July 20, 1976, in the Bronx, New York, JOSEPH BORIELLO told co-conspirator Travers that if Travers was arrested, BORIELLO and the people he worked with would furnish Travers with an attorney and provide him with $100,000 in return for which Travers was to remain silent and immediately flee the country and not return;

4. On or about August 17, 1976, co-conspirator Travers arrived in Honolulu, Hawaii, from Bangkok, Thailand, carrying approximately seven pounds of ninety-seven percent pure heroin in two suitcases;

DB:wp

A 10

5. On or about August 18, 1976, co-conspirator Portman arrived in Honolulu, Hawaii, from Bangkok, Thailand, carrying approximately five pounds of ninety-seven percent pure heroin with her;

6. On or about August 19, 1976, in New York City defendant MATTHEW MADONNA rented a rent-a-car under the false name of 'Paul DeRobertis' using an American Express card issued in the name of 'Paul DeRobertis' and a Florida Driver's license issued in the name of 'Paul DeRobertis' to which a photograph of MATTHEW MADONNA himself was affixed;

7. On August 20, 1976, defendant JOSEPH BORIELLO arrived in New York City from Bangkok, Thailand;

8. On August 20, 1976, defendant JOSEPH BORIELLO met defendant SALVATORE LARCA in the vicinity of SALVATORE LARCA's home on Delanoy Avenue in the Bronx, New York;

9. On August 20, 1976, in the vicinity of co-conspirator Travers' apartment on Creston Avenue in the Bronx, defendant JOSEPH BORIELLO placed the two suitcases referred to in Overt Act Number Four in the rent-a-car referred to in Overt Act Number Six;

10. On August 20, 1976, in the vicinity of 58th Street and 5th Avenue in Manhattan, defendants MATTHEW MADONNA and SALVATORE LARCA arrived in a cadillac registered to SALVATORE LARCA's wife;

11. On August 20, 1976, in the vicinity of 58th Street and 5th Avenue in Manhattan, defendants MATTHEW MADONNA and SALVATORE LARCA met with defendant JOSEPH BORIELLO:

DB:wp

12. On August 20, 1976, in the vicinity of 56th Street and 5th Avenue in Manhattan, defendants MATTHEW MADONNA and SALVATORE LARCA entered the rent-a-car referred to in Overt Act Number Six which contained the suitcases referred to in Overt Act Number Four.

(Title 18, United States Code, Section 846.)

COUNT TWO

The Grand Jury further charges:

On or about the 20th day of August, 1976, in the Southern District of New York, MATTHEW MADONNA a/k/a Paul DeRobertis, SALVATORE LARCA and JOSEPH BORIELLO, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 32.4 grams of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

Eugene W. Schreiner
FOREMAN

Robert B. Fiske, Jr.
ROBERT B. FISKE, Jr.
United States Attorney

A 11a

JF:kc

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

MATTHEW MADONNA, a/k/a Paul De Robertis, SALVATORE LARCA, JOSEPH BORIELLO, JOSEPH FLORIO, and RICHARD KLINGER,

Defendants.

BILL OF PARTICULARS

76 Cr. 846

S I R S:

The United States of America, and and for its Bill of Particulars herein, alleges:

1. With respect to the Overt Acts alleged in Count One, the Government states that the approximate date and place of occurrence and the persons present are as follows:

Overt Act	Date On or About	Place	Persons Present
1.	7/12/76	Daly City, California-Bronx, New York telephone call	Joseph Florio (California)-Eugene Travers (New York)
2.	7/13/76	California-Miami, Florida telephone call	Richard Klinger (California)-Jan Portman (Florida).
3.	7/20/76	Bronx, New York	Eugene Travers, Joseph Boriello
4.	8/17/76	Honolulu,Hawaii	Eugene Travers
5.	8/18/76	Honolulu,Hawaii	Jan Portman
6.	8/19/76	New York,N.Y.	Matthew Madonna
7.	8/20/76	New York	Joseph Boriello
8.	8/20/76	Salvatore Larca's home Delanoy Avenue Bronx, New York	Salvatore Larca, Joseph Boriello
9.	8/20/76	In the vicinity of Eugene Travers apartment Creston Avenue Bronx, New York	Joseph Boriello

JF:kc

Overt Act	Date On or About	Place	Persons Present
10.	8/20/76	In the vicinity of 59th St. and 5th Avenue New York, New York	Matthew Madonna Salvatore Larca
11.	8/20/76	In the vicinity of 58th St. and 5th Avenue New York, New York	Matthew Madonna, Salvatore Larca, Joseph Boriello.
12.	8/20/76	In the vicinity of 59th Street and 5th Avenue, New York, New York.	Matthew Madonna, Salvatore Larca

2. With respect to Count Two see particulars set forth under Overt Acts 9, 10, 11 and 12.

3. In addition to the particulars heretofore set forth in connection with Count One, the Government will prove at trial that in 1972, defendants Matthew Madonna and Salvatore Larca did negotiate with Nick Vesiciglia to distribute to Vesciglia 10 kilos of heroin. Defendants Madonn and Salvatore Larca had several conversations with Visiciglia to this end. However, because Vesiciglia's buyer did not provide the money, defendant's Madonna and Larca did not provide the heroin.

4. Additional co-conspirators not named in the indictment are Aurora "Doe", Ralph Battista, Li Chai, Rhonda "Jones", John Bellini and Leslie Laub.

Discovery and Inspection
Rule 16 (a)

5. The Government will provide each defendant with copies of his written or recorded statements or confessions, if any, within the possession, custody or control of the Government, the existence of which is presently known or which by the exercise of due diligence may become known to the attorney for the Government.

6. The Government will provide each defendant with copies of the results and/or reports of scientific tests or experiments made in connection with this case.

JF

Rule 16 (b)

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7. The Government will provide each defendant with copies of the documents which it at trial will seek to prove were at one time in the actual or constructive possession of said defendant or were procured or made directly or indirectly at said defendant's request.

Dated: New York, New York

October 21, 1976

Yours, etc.

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

By: _____
JOHN P. FLANNERY, II
Assistant United States Attorney
Office & Post Office Address:
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TO:
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26 Journal Sq.
Jersey City, N.J.

Alan C. Lippel
299 Broadway
New York, N.Y. 10007

ou will please take notice that a ____ hich the within is a copy, was this day entered in the within entitled action, he office of the Clerk of this Court.

ted, N. Y., _____, 19____

Yours, etc.,

United States Attorney
Attorney for _____

Attorney for _____

lease take notice that the within ____ be presented for settlement and signure of the Honorable _____ ted States District Judge, at the office of Clerk, Room 601, United States Courtse, Foley Square, Borough of Manhat-, City of New York, on the ____ day of _____, 19____, at 10:30 o'clock in the ____ noon or as soon thereafter as coun- can be heard.

Dated, N. Y., _____, 19____

Yours, etc.,

United States Attorney
Attorney for _____

Attorney for _____

United States District Court

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

MATTHEW MADONNA, a/k/a Paul DeRobertis, SALVATORE LARCA, JOSEPH BORIELLO, JOSEPH FLORIO, and RICHARD KLINGER,

Defendants.

BILL OF PARTICULARS
76 Cr. 246

ROBERT B. FISKE, JR.
TEL. 264-3311 ~~XXXXXX~~ 791-0073
United States Attorney
Attorney for ~~USA~~

Due service of a copy of the within is hereby admitted.

New York, _____, 19____

Attorney for

To

Attorney for

FPI—SS—6-13-74—50M—1214

A-114

it may be inquired into because if the Government did do that and if that act was circumvented by the counsel of Mr. Boriello and led to his call and willingness to cooperate or discuss cooperation, we have a greater degree of misconduct than that which your Honor made mention of in discussing, expressing Mr. Boriello's statement to me.

THE COURT: The application is denied. And an evidentiary hearing is denied.

MR. BROWN: There will come a time on cross-examination, your Honor, I think, when the issue of prior convictions may be pertinent. I realize that under the rule, Federal Rules 608, 609, there is some,to me, ambiguity, so I am asking for an opportunity prior to starting cross to confer with your Honor to determine which of this extensive sheaf is admissible on cross rather than ask something that is improper and I'm requesting a conference.

There are one or two which I think I should be allowed to ask about.

THE COURT: How far back do they go?

MR. BROWN: 1955.

MR. FLANNERY: He testified the only felony on the sheet --

THE COURT: He brought out the 1955, your Honor. There is one, for example, in 1966 which is possession of drugs, and I assume it was 1966 or 1967. He received six months for possession.

I think that under the rules in our court, in our Federal Court, that he only received six months, but it was an arrest of December 6, 1966.

Now, the others all predecessed that. The other in 1965 I read here, a weapon, one year, and I know the sentence could have been more than that. There are others, possession of narcotics, in which he only received six months under 3305 in 1964, so I do believe that they come within the purview of the ten-year rule, except that the 1955 robbery --

THE COURT: All right, Mr. Flannery.

MR. FLANNERY: I'm just getting out the rap sheet.

MR. BROWN: You may use mine, if you like.

MR. FLANNERY: I found it. I just want to make sure I'm correct about something before I say it.

I believe that the only felony he had was the 1955 one. That is the only one, and I'm checking it. I believe that is true. I offered it. I am permitted to discuss it so that is the entire record. I don't

think misdemeanors are properly subject to cross.

I object to any other discussion of any of these very old felonies he has which are much beyond -- well, which are beyond the 10-year period certainly and I believe with the exception of the five-year charge he referred to that they are only misdemeanors and for your Honor's inspection I would hand to your Honor 3511G and 3511H which are the 3500 materials which reflect the rap sheets, so that your Honor can make a decision.

THE COURT: All right.

MR. BROWN: My only problem with that is that the rule does not mention felonies and, for example, with the charge in the State of New York, on that statute you can get up to seven and he got only one.

THE COURT: The rule is that the felony convictions are convictions involving moral terpitude. I think that is the rule.

MR. BROWN: The rule reads, if I may quote--

THE COURT: I'm not reading the rule. When I talk about the rule I am talking about the rule of this Circuit as interpreted by the Second Circuit. Convictions, as I understand the rule, applies. That is what I said, felonies and crimes involving moral terpitude.

MR. BROWN: The rules say punishable by death or imprisonment. If the Circuit interpreted otherwise, I accept that.

THE COURT: The Circuit in United States v. Provo has adopted the rule, as far as I know, that acts of misconduct not resulting in conviction of felony or the crime of moral terpitude are not subject to cross-examination.

MR. BROWN: The rule, and again I'm not challenging your interpretation --

THE COURT: I don't care what the rule is generally. I'm attempting to indicate what the rule is of the Circuit that governs my conduct of this trial.

MR. BROWN: I accepted what your Honor said about the rule, but there is a second facet of the rule which I would call to your attention and on which I would ask your direction which involves dishonesty or false statements regardless of punishment. There is one that deals with forgery that resulted in a final charge of conspiracy. If that is covered under the Second Circuit rule so that I can't ask it -- of course, this one is a little different.

THE COURT: It would appear if there is a question of moral terpitude, I would certainly believe that

forgery is covered by that.

MR. BROWN: Yes.

MR. FLANNERY: I believe he is referring to a 1961 offense and it is within your discretion to consider whether or not to permit --

THE COURT: It is within my discretion, but you have asked him to testify and you asked him about that. I felt that going back as far as 1955, 21 years ago, would be rather stale, but you have gone back that far. I'm not going to bar these defendants from coming within the rule, any crime that meets that rule, the rule in that area, so that if there are any -- I haven't seen the sheet, but I just assume that any charge -- well, he wasn't convicted of that charge.

MR. BROWN: Apparently the claim of the charge of conspiracy is a misdemeanor he spend one year in the County pen. That is the way I read it. That is all I read here.

THE COURT: The final charge was conspiracy.

MR. BROWN: Yes.

MR. FLANNERY: It was not forgery.

MR. BROWN: Let me read fully what it says:

"Final charge conspiracy as a MISD sent one year County pen on charge of violation 889-B, PL,

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one year west co per other counts and other indict dismissed."

That is on aiding and passing forged prescriptions -- felony charges as a misd. I can't understand it. I get the impression that they dismissed the counts, don't you?

MR. BROWN: No, because the final charge conspiracy, sent one year and --

THE COURT: But other charges dismissed. That is when I come to the forgery.

MR. BROWN: It says "per other count and other indict dismissed." I don't know which one they are talking about. There are two. One is aiding and passing a forged prescription and final charge as conspiracy. I agree with you it is not clear.

[continued on next page.]

ke 2 p.m.

mplt 1

THE COURT: Well, my feeling is that -- let me look at it. But my impression now is that the forgery count has been dismissed and it therefore doesn't appear to be in there.

MR. BROWN: I don't know, Judge. I think it is conspiracy to forge as opposed to forgery.

THE COURT: Where are we?

MR. BROWN: Judge, the very first page with the raps on it. It says "7/13/61," and then there is that cryptic remark.

THE COURT: Yes. I see it.

(Pause.)

THE COURT: Well, as I read it. The only thing that you have under that count -- what you were reading goes to the other count.

It seems to me the final charge was a misdemeanor and he was sentenced to a year. Violating 89(b). I don't know what that is.

No, the way I read it, Mr. Brown -- if you can enlighten me further on it --

MR. BROWN: I wish I could. Is there any way that we can ask him out of the presence of the jury?

MR. FLANNERY: I will go out and get him.

MR. BLOSSNER: If your Honor please, prior to the

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luncheon recess, I said that any litigant has standing to challenge the reliability of any evidence presented against him or her --

THE COURT: That has nothing to do with the issue before me.

MR. BLOSSNER: If your Honor please, can I cite the law?

THE COURT: That's a general statement, and I am not taking any objection to that. That is completely innocuous. That is not helpful. That is not the issue we were addressing.

MR. BLOSSNER: Your Honor, that is United States v. Gigante.

(Jury in the box.)

J O S E P H B O R I E L L O, resumed.

DIRECT EXAMINATION CONTINUED

BY MR. FLANNERY:

THE CLERK: Mr. Boriello, I remind you that you are still under oath.

MR. FLANNERY: Your Honor, before the luncheon recess I offered Government's Exhibit 50A, the tape cassette and 50, the transcript.

THE COURT: All right, the objection is overruled.

Matty and Salie, and I think -- I don't want to surprise anyone, but at some point as this thing has gone on so extensively, to the extent it is audible, I'm going to insist that the jury hear the entire thing. I don't see any alternative to it. I think this is a serious question.

THE COURT: I will cross that bridge when I come to it. I think the defense or the Government, over the objection of the other party, can play part of it if they insist.

MR. BROWN: I don't know.

THE COURT: Let's begin the cross-examination. What else is there?

MR. FLANNERY: The other matter was the impeachment. It is my understanding that it was ultimately a misdemeanor that he pled to.

3.2 MR. BROWN: The nature is what counts. What is forgery?

MR. FLANNERY: He was apparently with a friend who was around the corner obtaining a forged prescription and the friend implicated him, and there was plea bargaining. I'm not sure whether they were both addicts at the time. It is a somewhat equivocal situation for one to include any moral terpitude.

MR. BROWN: Certainly forgery prescriptions -- certainly it goes to this kind of situation. I hate to call it morality, but moral terpitude, whatever that means.

THE COURT: I'll think about it for awhile. I don't think so. As far as I can read that thing he was a victim of a conspiracy.

MR. BROWN: It had to be forged, as Mr. Flannery said, if he was with another chap.

MR. FLANNERY: It is a misemeanor. It is not moral.

MR. BROWN: You'll reserve anyway and I won't use it.

THE COURT: I will, and I will think about it.

MR. BROWN: Your Honor examined the sheet. Is that the only one that comes within that ruling?

THE COURT: You didn't ask me to examine it. I thought you had.

MR. BROWN: I pointed out to you that there were heroin convictions. They only gave him six months.

THE COURT: No, they can't come in, felonies and moral terpitude.

MR. BROWN: One was a gun.

THE WITNESS: That is not either, but I didn't really look at it.

MR. BROWN: For the record, you looked at the particular --

THE COURT: I just assume that you were going to point out to me ones you thought of. I didn't look at the rest.

MR. BROWN: Are we required to cross in the order of the indictment or can we make arrangements?

THE COURT: It is up to you. I don't care.

MR. BROWN: There is no problem if I go first?

THE COURT: No problem in my mind. I must in order for me to keep up with it, I'd like that whatever you agree upon to start with, that is the order that you are supposed to conform to the rest of the time. It is up to you gentlemen.

MR. LIPPEL: That will be all other witnesses.

THE COURT: It seems to me it would be better to keep in my own mind who has finished cross-examination. It is easier if you go in the particular order, but even then if it proves that you want to make some changes, I will consider it. But I don't care what order you go in.

MR. BROWN: I'll go first and he will go

receipt of the 3500 material, there is a matter which we would urgently ask to bring to your Honor's attention at side bar.

J A N P O R T M A N , called as a witness on behalf of the Government, after having been duly sworn, testified a s follows:

DIRECT EXAMINATION

BY MR. FLANNERY:

MR. ALCH: Are we allowed to approach now, your Honor?

THE COURT: I thought it was as to questions you want to ask.

MR. ALCH: No, your Honor, it is a matter as to which I seek your Honor's ruling in anticipation of what I think the Government is going to ask of the witness.

THE COURT: If we are going to do that I think the best thing to do is to excuse the jury for lunch. You may be excused until two o'clock.

[The jury left the courtroom.]

THE COURT: Miss Portman, you may step down.

[Witness temporarily excused.]

THE COURT: I don't have the 3500 material.

11 mcsr

I think it would be helpful if I had it.

MR. ALCH: Do you have a copy of the conversation between Miss Portman and Mr. Klinger dated August 20?

MR. FLANNERY: Here is a copy of the transcript, your Honor.

THE COURT: All right.

MR. ALCH: Your Honor, I'm referring to Page 6 of the transcript and ask your Honor to read from approximately the middle of the page to the first line or first two lines of the following page, Page 7.

THE COURT: All right, I have read it.

MR. ALCH: Also, your Honor, I believe my argument will embrace the fourth line or the third line on Page 10.

THE COURT: Yes.

MR. ALCH: Page 10 begins with Miss Portman: "Yeah, no, no, I just, I, but uh, you know that's why I hope he's you know, everything's okay with him," and I make specific reference to Mr. Klinger's response.

THE COURT: Yes.

MR. ALCH: My objection is based upon Rule 403 in that we must keep in mind that Miss Portman, at the time the telephone call was made, was a defacto agent

A 25

12 mcsr

of the Government and the conversation o. Pages 6 and 7 was not only initiated by her but some, if not all of the prejudicial words such as "godfather" and "Mafiosa," which are actually said by Miss Portman in an obvious attempt to elicit some type of incriminating response from Mr. Klinger.

In addition to that, it would only be a matter of prejudicial speculation as to who Mr. Klinger is referring to, because there is no name mentioned. Mr. Klinger could be talking hypothetically. It is really difficult to do anything about speculation on a matter that is so prejudicial.

That I feel, combined with, as I say, the words and the whole tone of the conversation being prompted and initiated by Miss Portman knowing the conversation was taped with the agents listening nearby, would be most prejudicial, even if your Honor would deem it relevant, and give the jury an opportunity to speculate on a most prejudicial allegation which is also self-serving by the Government made by an agent.

MR. FLANNERY: May I respond, your Honor?

The state of the law as expressed in Grunewalt v. United States and progeny about statements made after the arrest of certain people on conspiracy is that

13 mcsr

for the most part a conspiracy is considered concluded when virtually the conspiracy is brought to the end by the arrest of the people, in this situation Mr. Klinger, and there is already testimony in the record about that. Mr. Klinger was in a position to provide for a contact should Boriello not be present.

The testimony that will be evinced form Jan Portman is that if she can't get in touch with Mr. Boriello Mr. Klinger will provide a way for her to contact someone or to contact him. Further, there will be testimony from her,as there has already been from Mr. Boriello, that half of a ten dollar bill was given to her so that that person, when they finally came to her, could be identified.

This conversation is made, therefore, when there are members of the conspiracy including, as we have already heard the testimony, Ralph Batista and others known to the Government.

THE COURT: That isn't what Mr. Alch is objecting to.

MR. FLANNERY: I'm trying to set some predicate.

THE COURT: The problem in my mind is the fact that Miss Portman initiated these references.

14 mcsr

MR. FLANNERY: That is not accurate. A reading of the transcript, as your Honor will see, and as is true of any cooperating individual --

THE COURT: Where are you going to read from now?

MR. FLANNERY: I will direct your Honor's attention to Page 6, to do it in the order that the objections were raised. She starts a discussion to indicate "like the people he works with, are they really, you know, up there. The people, you know, I know" --

MR. KLINGER: It says "Heavy duties."

Portman says "They're really heavy duty."

Klinger says "heavies."

Portman says real heavy duty." But you, do you know any of them personally? I mean,you know" --

THE COURT: Are they --"huh? "

Then Klinger says "I, I don't know. Call him the godfather."

Then Portman says "The Godfather, you call him, but that's about it?

"Klinger: Yeah.

"Portman: "Huh. But they're pre-- they're really heavy duty?"

They are asking who Mr. Klinger was associated

with to try to find what members of the conspiracy were around which is the usual way a "agent", someone who cooperates with the Government, is trying to find out where the rest of the conspiracy is, who else is involved, participating. In this situation he volunteers the godfather. The godfather isn't put in his mouth. There is a question about the usual situation that one is concerned about, the Bruton situation. If one were to consider this just as an admission, there is a concern when a confession is given that in the confession another person is implicated, but United States v. Wingate was clear that when the references is as general as this that there isn't any problem under Bruton and I think that if he has indicated, calling him the godfather, in light of testimony of Phyllis Hirschorn, it is a short-hand of talking about a person and Mr. Klinger knows and he chooses not to tell it to Jan Portman.

I think it is admissible. It seems to be an introduction as to narcotics in a criminal prosecution and it is not nice , which is what a criminal prosecution is about. It is not about what people have done that is nice.

The last portion, Page 10, the reference by Portman about Boriello's use of narcotics, and he says

"Yeah, because otherwise he, he's liable to get shot."

We are talking about what this organization is willing to do to protect itself, what Mr. Klinger's knowledge of that organization's ability is, its extent and manner of operation.

THE COURT: I suppose more precisely your answer to Mr. Alch is that these are prejudicial statements but not statements that came from Miss Portman.

MR. FLANNERY: No, they came from Mr. Klinger.

THE COURT: At least on Page 6 when he said the godfather, she is the one that mentioned Mafiosa, but not before he said godfather.

MR. FLANNERY: That is correct.

THE COURT: Then in terms of the sentence on Page 10, he is the one who says "He's liable to be shot." She didn't suggest that.

MR. FLANNERY: NOt at all.

MR. ALCH: If I may call one more fact to your attention, the date and the time on this conversation is August 20,1976 at approximately 10:05 pm. Now, at that time or that day the conspiracy unequivocally was over as far as my client was concerned and if I may take the liberty of speaking for Mr. Brown, as far as Mr. Larca is concerned, because they had been arrested at approxi-

mately seven p.m. We have a statement which is clearly not made pursuant to and in furtherance of the conspiracy because it had ended, as far as my client was concerned.

Secondly, they can't have it both ways. We have a Bruton situation, that plus the speculation involved.

THE COURT: I think that Mr. Lippel wants to speak.

MR. LIPPEL: I perhaps am in the worst position. I think Mr. Alch's position is correct. However, I feel I'm in the worst position because my client has presumably made these comments.

I would only point out, your Honor, that this does not really in any way contribute to the proof on trial. We don't have a godfather on trial. We don't have a Mafiosa on trial. There is no charge of a shooting or any allegation that a shooting was ever discussed or anybody ever being shot. I think the prejudicial effect far outweighs any probative value. That is the reason I object to this.

MR. BROWN: I think one has to examine 403 in order for me to make an argument that would be a contribution. In the first place under 403 it has to be evidence which is probative, that is, "If its probative

value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of emulative evidence."

5.3 I would rely on the fact that this particular statement coming as it does concededly after all the actions and all the people involved are under arrest and the conspiracy is terminated, with the possible exception, I might add, of Mr. Klinger, who apparently was not under arrest at that time, but of the persons who were referred to being under arrest and the conspiracy might be called at an end, therefore we are dealing with two issues, one the relevance and the probative value of the statement. Certainly it is not probative of any issue before the Court because it doesn't refer to anyone here except Mr. Boriello who is testifying for the Government.

Now, Rule 403 also talks about a confusion of the issues and let me give you what I consider a typical example of that, Judge. There has been two opinions given with respect to the language on Page 10 which says that "He's liable to get shot."

If one goes back to Page 9 where this began, Miss Portman says that she saw -- I'm reading from Page

9:

"But uh, you know, I saw him that morning and uh, you know, I didn't think he was, I didn't think he was gonna be, you know, holding anything or, or doing any smuggling himself, since I, I , you know. I believed, you know, he's got a, he's got a sheet or something, right?"

I believe that refers to a rap sheet.

"Klinger: Yeah, well, don't, don't" --

Then Portman: "Yeah, no, no, I just, I, but, uh, you know that's why I hope he's you know, everything's okay with him.

"Klinger; Yeah, because otherwise he, he's liable to get shot."

It is that interpretation -- just as analogous to a situation where a person with a rap sheet -- with the DEA he might be a known person who might get himself shot as a conclusion. That I think was being conveyed, that he was in an organization that would shoot him. That is totally inconsistent with the sense of what is said. Certainly if any man was doing any smuggling it was this man. What we are talking about is the unfair but common characterization of the DEA's attitude. Mr. Boriello testified if he tried to make a break he would

get shot.

I'm just arguing that this is subject to who some kind of confusion. I'm saying that is the way a jury would interpret it. It possibly would interpret it adversely.

Going back to Page 6, I think there is no question that up until the bottom of Page 5 Miss Portman was, at the behest of the Government -- I think that is admitted, talking to Mr. Klinger about contact with Mr. Boriello and information about him, her attempt to receive him. Then she goes into a second stream of consciousness and that is, I think, demonstrated at the point where they begin to talk about professionalism and Miss POrtman says on Page 6 --

THE COURT: I have read it.

MR. BROWN: This is, I think, the part that she is the one who instigates because she is the one who talks about professionalism and he says "You got a mouth and you're a professional, right?"

That is what Klinger says after she says it. Then she says "Okay, so do you know -- like the people he works with, are they really, you know, up there. The people, you know, I know" --

Then Klinger, who may not know what he is

talking about says "Heavy duties."

But his testimony before the jury is to the effect that Mr. Klinger does not know anybody except Mr. Boriello and except Mrs. Laub and therefore, your Honor, the interpretation that could be made here was not justified by anything in the evidence and, in fact, is contradicted . Mr. Klinger is saying something that he knows about nothing. It is interpretation really, "heavy duties, heavies."

"Do you know any of them personally?"

Then he says " I don't know. Call him the godfather."

He may very well be referring to Mr. Boriello.

THE COURT: I have heard enough. There is no question in my mind that this entire conversation is admissible as to Mr. Klinger, no question about that, nor is there any question in my mind that there is no basis for excluding this on the grounds that Mr. Larca and Mr. Madonna were under arrest and as to them the conspiracy was at an end. They were still going on as far as Mr. Klinger was concerned.

Nor is there any question in my mind about page 6, but I will think about it over lunch. I don't really see any basis upon which this statement ought to

be excluded, but I will give it some thought.

MR. ALCH: Just one more moment, and I know I'm intruding on your lunch hour, but it is important. I say this most respectfully, just because I may not have made myself clear: My position is that, NO. 1., it fits under Rule 403; No. 2, it should be excluded because it was not made in furtherance of the conspiracy before it ended. No. 3, if your Honor feels that it was made in furtherance of the conspiracy I'm in a Bruton situation because I've got to be able to put this man on the stand and elicit from him that he didn't know my man, Mr. Madonna, and couldn't have been referring to him because he had never had any contact with him. That is going to be inferred or may be inferred by the jury and I cannot bring it out unless I call him to the stand, your Honor.

As I said, the Government simply can't have it both ways. If your Honor feels that it was in furtherance of the conspiracy, which I respectfully take issue with, then the only way I can clear it up, clear up this area of speculation, is to call him to the stand and I'm in a Bruton situation.

THE COURT: I'm not sure, but anyway I'll think about this.

MR. FLANNERY: Could I refer you to a case just on this Bruton question that has been raised by defense? It is United States v. Wingate at 520 F. 2d and at 309, Page 309, a Second Circuit case from 1975.

THE COURT: All right.

MR. ALCH: It won't be susceptible to any curative instruction if you allow it.

THE COURT: We will adjourn until two o'clock.

[Luncheon recess.]

ke 1 p.m.

mplt 1

AFTERNOON SESSION

2 p.m.

(In open court - jury not present.)

MR. LIPPEL: If your Honor please, I would like the opportunity, before you bring in the jury, to make a motion.

THE COURT: All right. I don't want to --

MR. ALCH: Your Honor, may I be heard?

THE COURT: No, you may not. I am trying to say something, Mr. Alch.

MR. ALCH: Before you rule, your Honor, I would like the privilege of addressing the Court.

THE COURT: Yesterday and today I have been ready to start this case and I had to wait yesterday for Mr. Flannery and today I had to wait for all of you except Mr. Lippel. I realize that you do have some problem about elevators in this building, and so forth, but I want to insist that everybody be here on time.

MR. BROWN: Judge, can I say something in this connection?

I think you let us go for lunch at ten after.

THE COURT: Yes. I wasn't extending the time. It is because you were using it up, yourself.

All right, I will hear from Mr. Lippel.

mplt 2

MR. LIPPEL: My motion, your Honor, is for a mistrial, based on two grounds:

Number one, the content --

THE COURT: I am not going to hear that now. You can put that motion on the record at 5 o'clock. If it has something to do with this issue, I will hear it now.

MR. LIPPEL: No.

THE COURT: Your motion for a mistrial can wait. I will hear from Mr. Alch. You can wait until 5 o'clock.

MR. ALCH: Thank you, your Honor.

Your Honor, first, with regard to whether or not the statement made by Klinger in the conversation on the telephone recorded was in furtherance of the conspiracy, the indictment in Count 1 charges the conspiracy to import. That had been accomplished. Count 2 doesn't even mention Mr. Klinger whatsoever.

Therefore, I feel that the conspiracy was ended for our purposes.

Number two, reason dictates, I respectfully submit, that the purpose and the only purpose for Mr. Flannery's insistence that this disputed portion of the trip be included, is to be able to argue to the jury the inference that the word "Mafiosa" and "Godfather" pertain to either defendant Madonna or the defendant Larca.

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Now, in the case Mr. Flannery cited to your Honor --

THE COURT: He can't possibly argue that.

MR. ALCH: It is an inference, your Honor, which I presume he will argue. But in the case he cited to your Honor, the Wingate case, which he read just now, in that case, the declarant, who corresponds with Mr. Klinger, had been deprived of his right to make the statement. That factor is missing here.

Number two, the Court held that they didn't have a Bruton situation because the references were deleted from the statement by Judge Frankel, and Judge Frankel not only limited the references to other co-defendants or any references to those who could be construed as co-defendants.

THE COURT: I thought this was Judge Cannella's case.

No, you're right.

MR. ALCH: I thought it was Frankel. Yes. Judge Frankel instructed the jury, even after redacting the portions in dispute, that they could only consider it against the declarant, which in this case is Mr. Klinger, and in that case, one of the bases for including the redaction and the limiting instruction was the fact that the portions of the conversation in question weren't a vital link to the government's case

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against the co-defendant -- and I am making the analogy to Larca and Madonna -- had already been taped, referring to obtaining the heroin.

THE COURT: All right. That states the rule as I understand it.

MR. BROWN: Judge, I think Judge Mansfield's dissent in Wingate is the only part of the case I understood, and therefore I guess it is only reasonable for me to argue it although it may not be what reason dictates.

He said, "I believe the proper rule to be that if the evidence clearly inculpates the co-defendant, it may not be received against him."

I guess that also means that a limiting instruction would be adequate. This was discussed in the other cases. In this case we don't have a Saro situation, but quite obviously it was the other man. We don't have that. But I as' if your Honor would consider a redaction of those expressions, the other expressions do not weaken the state's case and that is the thread that runs through all the other cases as well.

If that fails, I ask for a limiting instruction .

MR. FLANNERY: Just briefly, your Honor:

The conspiracy charged is not only to importing into the United States from other countries, but importing to

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distribute. It is not just to import the heroin, but to do something with it when it got here and a common understanding of why the heroin was imported.

Count 2, obviously the government is charging the accomplishment of it, in this case in terms of a controlled delivery.

The conspiracy, going along that line for one moment, which continues, is that those other members of the conspiracy continued to act in furtherance of it, who were not arrested; Battista, who was one of the partners, Mr. Klinger, who following the arrest of Boriello may have been contacted and taken the necessary steps to further the conspiracy and obtain the heroin.

The other side of the coin is, assuming that this conversation is not in furtherance of a conspiracy and admissible on that ground, it is nevertheless an admission by Mr. Klinger, and the admission is made in consentual recording of the conversation with Jan Portman, and the statements they make about this source are relevant, and the statement he makes about his understanding about the manner in which the conspiracy operates and the violence that they are willing to use to effect the intergity of that conspiracy are relevant and probative.

The Bruton problem that is suggest is non-existent,

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because it refers to whoever in New York, it is obvious from the testimony, that it is people in New York connected with Boriello, and it is obvious that it is someone in New York, and I don't think that there is any such Bruton situation as there would be if a man went into a room when there was only one man in there and came out and made a statement about "myself and whom I met in the room," and then if in the trial the statement of the person who came out was admitted, then there would be a problem with the person who was left in the room.

We have a number of people, and I don't think it is anything like a Bruton problem as in the Wingate case.

If your Honor views it as a statement, an admissio and not in furtherance of the conspiracy, the government has no intention to suggest in terms of his confession that he is referring to any specific person as the "Godfather." We wil rely on other arguments with respect to Madonna and Larca specifically, and I am thinking not only about the testimony so far, but also prior similar acts.

MR. LIPPEL: If your Honor please, may I respond to that --

THE COURT: All right. I have been hearing argument --

MR. LIPPEL: I have not expressed the point,

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number one, that this is not admissible as an admission. It is a consentual tape, and I agree with Mr. Flannery on that.

I am merely asking for the deletion, the redaction of that portion, which really in no way furthers Mr. Flannery's case. The reference, as he has already stated, is not a reference to anyone sitting at counsel table. "Mafioso," "The Godfather," the shooting, it has no direct reference to anyone at this table.

For that reason, your Honor, it would only tend to inflame the jury. It is explosive, inflammatory and in no way furthers the proof. The proof is in the other parts of the statement of that tape.

MR. FLANNERY: Your Honor, if I may respond with two or three sentences.

THE COURT: All right.

MR. FLANNERY: In Mr. Lippel's opening he said that the involvements of his client as the evidence would demonstrate, was to have conversations with people when he was unaware that anything was being moved or anything of the sort and in fact he believed that what he was doing is not criminal.

This tape shows that this man was aware of the nature and extent of the operation to a greater degree than was suggested --

mplt8

THE COURT: As I said when I left after the morning session, I did not see how this conversation could conceivably be included as to Mr. Klinger. I think that the references that are made are references that do go to the -- or would raise some inferences in the jury's mind, making them think that the people involved are violence prone.

But my feeling is that that is not prejudicial in the sense of the law. I think that they would understand that by virtue of the testimony that comes in, by virtue of the very nature of what was happening.

I am going to admit the statement. I am going to specifically instruct the jury that the statement can only be utilized and used in reference to Mr. Klinger and cannot be used in any way in reference to either Mr. Larca or Mr. Madonna, and they may use it solely in terms of the question involved of Mr. Klinger's knowledge of the nature of the acts which he engaged in and his intent.

All right, bring the jury in.

MR. ALCH: Your Honor, for the record, may I move for a severence at this time?

THE COURT: Your motion is denied.

MR. BROWN: I guess, Judge, that's one of the motions you have to join in, you can't just accept. I move for a severence.

A I believe it was the 20th.

Q Did there come a time when you tried or when you heard from Boriello on the phone when you were at the Sheraton?

A No, I never heard from Boriello.

Q Did there come a time when you made a phone call while you were at the Sheraton?

A Yes, I made a phone call.

Q Who did you call?

A I called Richard Klinger.

Q What did you say and what did he say in the course of that conversation?

MR.BROWN: I object at this time and I would ask your Honor at this time for instructions.

MR. FLANNERY: This is the thing we were discussing.

THE COURT: All right.

I want to emphasize what I think I told you when you sat down, that any statement that is made by any defendant out of the presence of any of the others is to be used by you only in connection with the parties participating in the statement and therefore the conversation with Mr. Klinger is to be considered by you only as it refers to Mr. Klinger and you cannot use

it in reference to either of the other two defendants. All right.

MR. FLANNERY: Just one thing. I would like to ask the Court if in giving those instructions they are different than co-conspirators; is that correct?

MR. BROWN: I object to that.

THE COURT: The point is I'm giving that statement now. Let's not get into views, Mr. Flannery. That is a statement that the jury is to go by in regard to those instructions.

MR. FLANNERY: I want to make sure that we are discussing --

MR. BROWN: Objection.

THE COURT: Ask your question.

Q Will you please tell us now what was said in the conversation, what you said and what Mr. Klinger said, as best you recall?

A To the best of my recollection, he answered the phone. I said "Hello."

I identified myself. He identified himself. I told him that I had just gotten back from my trip and I told him I had been delayed in Honolulu a couple of days and I thought that Joe Boriello might be worried, he might have been trying to get in contact with me

since I had the stuff, and he gave me Joe's number and address so if I wanted to get in contact with him I could.

He asked me how the trip was. He asked me, he said, "Everything came out okay?"

I said, "Yes." I said "You know" -- referring to it -- "that the heroin was in the country."

I asked him if he was going to be getting anything out of this. He replied "Yes," he hoped so.

I asked him if he knew who any of Joe Boriello's people were, people that were buying, people that gave him the money to make this whole thing possible. He laughed and he replied that they were the type of people he wouldn't really want to know. They were heavies, heavy duty, as he said, very heavy duty people.

Then he told me "Let's just call him the godfather."

Q Was there anything else in the conversation that you remember?

A We discussed -- I again asked him about what was supposed to be the price I was to be paid for doing the courier work; that Boriello and I had a disagreement about it. He told me he wasn't exactly sure; that Boriello would take care of me because he does everything first class and I don't have to worry. He would take

care of my situation.

Q This conversation that you had with Mr. Klinger, was it recorded?

A Yes, it was.

Q And you gave your consent to have the conversation recorded?

A That is right.

[Continued on next page.]

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Q Have you listened to the tape recording of that conversation?

A Yes.

Q I direct your attention to Government Exhibit 52A.

MR. LIPPEL: I object. I would object at this point on other grounds that were expressed before. It is cumulative. We have gotten testimony as to the conversation.

THE COURT: Are you introducing it? We have already had testimony about the conversation and now we are going to hear it; is that what you plan?

MR. FLANNERY: Yes, your Honor.

THE COURT: I'll allow it this time, but if this is what the conversation was, if you have elicited what the conversation was, we don't need to go through it twice.

MR. LIPPEL: May I be heard at the side bar?

THE COURT: No.

MR. LIPPEL: It seems to bolstered --

THE COURT: No, Mr. Lippel, you may not, and you may not come to the side bar and you may sit down.

Q Directing your attention to Government Exhibit --

MR. BROWN: I just want to make sure I have an objection on the record.

THE COURT: I didn't hear you.

MR. BROWN: I had initially rose. My syntax is

terrible but my intention is all right.

I initially rose and I was pre-empted by my colleague. It would have been the same objection.

THE COURT: All right.

Q Again directing your attention to Government Exhibit 52A for identification, can you recognize that?

A Yes, this is the original tape, I believe.

Q And how can you recognize it?

A I initialled it on the 30th of October.

Q Did there come a time when you reviewed a transcript and listened to the tape?

A Yes.

Q Did the transcript accurately reflect the conversation on the tape recorder?

A Yes, it did.

Q Directing your attention to Government Exhibit 52 for identification, what is it?

A This is a transcript of the tape. I also initialled it on every page.

MR. FLANNERY: Thank you.

Your Honor, the government offers 52 and 52A.

MR. LIPPEL: I have the same objection to 52A.

THE COURT: I understand. The objection is overruled.

XXX

(Government Exhibits 52 and 52A received in evidence.)

THE COURT: Ladies and gentlemen, remember the tape is going to be played and you are going to get a copy of what purports to be a transcription of what occurred on the tape. You will recall that I indicated to you that the transcript may aid you in understanding what comes on the tape, but you are to be guided by what you hear, not by what is on the transcript.

(Pause.)

(Continued on next page.)

but I did want to ask you now if you would let me add two minutes of argument to my memorandum.

THE COURT: If I recall -- I don't know whether you were here when your memorandum was handed up -- but Mr. Flannery asked I think until today to be able to file a memorandum. I'm waiting for his memorandum.

MR. FLANNERY: I passed it up to your Clerk, your Honor, this morning.

THE COURT: I haven't read it and therefore I may not, as a matter of fact, be in a position to make a ruling today, except for the fact that I will have to look at the bill of particulars.

MR. HUGHES: I'm under a slight difficulty. If your Honor could assist me, I would appreciate it. I will have to leave at about twelve o'clock today to teach some classes. I did want to make a very small additional point. I can make it in one or two minutes now if you'll let me.

THE COURT: I will, but before you do I think your memorandum indicated that you were of these prior similar acts through the Government's bill of particulars.

MR. HUGHES: That is correct.

THE COURT: Direct me to where that is in the bill of particulars and what it is, and then I'll be

able to follow your argument.

MR. HUGHES: We have a copy here, your Honor, yes.

THE COURT: I have a copy.

MR. HUGHES: It is Paragraph 3.

THE COURT: All right.

MR. HUGHES: May I proceed?

THE COURT: Yes.

MR. HUGHES: The additional point I wish to make is this: I think a distinction ought to be drawn between a case where the Government would seek to put in this evidence in their case in chief and a situation where it might want to put it in on rebuttal, where the Government would offer a certain kind of intent, act or mistake.

In the first place, I submit that there is no prima facie foundation for putting this in. If we put in a certain kind of defense I would want to make a concession and the concession is that this kind of similar act does generically fall within the exceptions to the rule. What I would like to suggest is that that is only the first hurdle the Government has to jump, not enough to show that it is in a way susceptible to rebuttal in the event it is accident. They have to show also that

it is clear and convincing and it is sufficiently proximate in time. So our ultimate position is that in no event ought it to be admitted in the case in chief.

While there is some prima facie viewpoint that it falls within the kind of evidence that that is admissible in rebuttal, in this particular case it should not since it fails to meet the conditions of proximity in time, clear and convincing evidence and so forth.

THE COURT: It is my understanding -- I don't know whether you agree -- that the rule of the Second Circuit is that evidence of prior similar acts is admissible except if it is introduced solely for the purpose of proving criminal character.

MR. HUGHES: That is so. The Second Circuit takes the so-called inclusory approach, I agree, your Honor, but, as I pointed out in the memorandum, there are cases not only in other circuits but in the Second Circuit too which do indicate that there must be a connection of proximity and there must be clear and convincing evidence and ultimately we rest on those points.

THE COURT: I have your cases. I think I have read with some care all the cases that you suggested in your memorandum and it was my impression -- and I wasn't aware that I was going to have to make a ruling very fast,

but it was my impression that the Circuit rule was consistent to the effect that the prior similar act would be barred for the purpose of the prosecution was only to prove criminal character.

I think the other part of the rule is that the prior similar acts are more apt to be more or less not crucial or critical to the prosecution's case, as I understand the rule of the Circuit, and I suppose that since I have heard from you, maybe I ought to hear from Mr. Flannery.

MR. BROWN: Will you hear from me?

THE COURT: Yes. I thought Professor Hughes was speaking for everybody.

MR. BROWN: He is to this degree, and I join in the motion and the memorandum submitted on behalf of both, and I hope that it is noted by the Court.

There is one other point that I think has been established in this Circuit and in others, and that is that prior similar acts are only admissible over proof of the initial charge as embodied in the indictment as recent, and to buttress the second point that you made, it is not to be primary and not to be in development of the concept that is proposed by the Government, but that the request to charge, for example, and there are about

ten cases in the United States which help to formulate these, is that they are only admissible after the initial charge is proved beyond a reasonable doubt.

THE COURT: I think there is some confusion about that, Mr. Brown.

MR. BROWN: There are a number of cases on it.

THE COURT: I will read them, but it is my understanding that when prior similar acts, if admitted -- that it is my application to charge the jury that the party is not on trial for those acts and that they are not related to this case, and that they cannot consider those prior similar acts unless and until they find that the Government has established the acts for which the people are charged. If they are satisfied that the Government has established that, then they may consider the prior similar acts. They don't need to, but they may, as going to the question of intent.

MR. BROWN: Yes, sir.

THE COURT: That is my understanding.

MR. BROWN: That is why my presentation to you I was careful to say that the ten cases that I have listed and which I have in my memorandum evolve from the request to charge which say precisely what your Honor has said and therefore my evolution of thought is this:

That it is the case -- let's assume a situation where at the end of the state's case they have not established to the satisfaction of the Court their case, so that they get by the request for a directed judgment. Then of course it would not play a part. But my argument is that if the case itself until that point where the primary case has been established, it is not subject to introduction, and that is why so many of the cases deal with rebuttal concept.

Now, Judge, the other thing I want to say is that I had the advantage of the professor because I read the memorandum just given to me fifteen seconds ago. You asked about the bill of particulars and it is true that as to that one individual, Visegli, there is a more fullsome description of the events that are set forth in Precis, and my application to you, Judge, is this: that if this is not critical as of today, in other words, they are not bringing this in today, would your Honor be good enough to withhold judgment until Monday morning, because I did rely on the memorandum. I have done my own research and if you would do that --

THE COURT: I certainly will, Mr. Brown. I was merely allowing argument to accomodate Professor Hughes.

MR. BROWN: Yes.

THE COURT: As a matter of fact I was going to suggest that if the Government was not going to introduce it today that maybe we could put off the argument till Monday.

MR. BROWN: All right.

MR. FLANNERY: The Government does not intend to introduce it today.

THE COURT: It does not?

MR. FLANNERY: No, it does not intend to introduce the act today. However, if the Court could find time, I would ask the Court to reach a decision by the conclusion of business today, so that the Government can over the weekend prepare what would seem to be an appropriate order of proof in the case, including or excluding the prior case, depending on which way your decision were to go.

With respect to the merits of the admissibility of the prior criminal act by defendants Madonna and Larca, the cases inadvertently overlooked by counsel for the defense say that one of the considerations is whether or not the intent is an issue. The opening remarks by Mr.Alch clearly placed in issue, after conceding a number of acts which I think circumstantially demon-

strate Mr. Madonna's involvement. He stated: "The one link, the separate identity of Paul DeRobertis and the renting of that car, the evidence will show with that transaction. That is the only reason my client sits here."

There are other circumstances beyond that, your Honor, but the main thrust of the defense's opening was: He has done what the Government has said but his state of mind was not to have the intent to receive these narcotic drugs, and so that the intent issue is clearly placed in the case as a subject of scrutiny by a jury and with respect to the other arguments I suggest you go through the memo.

THE COURT: I understand and I will read your memorandum. The basis for letting those things in would be a limiting instruction for the jury. That is going to be the basis upon which I will view it and allow or not allow it.

I think that since you have just filed your memorandum, if the defense wants to have time to respond, and I gather they do, I don't see where it is going to be any prejudice to the Government for me to delay my ruling until I hear further.

When are you going to file another memorandum,

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Mr. Brown? I take it you want to.

MR. BROWN: Yes.

THE COURT: When can I get it?

MR. BROWN: I will have it done tomorrow. I think the reality of the trial is such, that, for example, we received this kind of stuff last night. I would get it to you by Monday morning, if your Honor will permit.

THE COURT: I think what you ought to do, Mr. Flannery, and I think you are in a position to do that, is that you will just have to be prepared whatever way the ruling goes.

MR. FLANNERY: Certainly, your Honor.

THE COURT: And I think I'm required to give them an opportunity to respond.

Anything else? Are all the jurors here?

THE CLERK: Yes.

THE COURT: Anything further?

MR. HUGHES: I'm not sure now, but I thought at the end of yesterday you were reserving a ruling on whether to admit the transcript, a redacted transcript of Mr. Boriello's guilty plea.

THE COURT: I reserved ruling on it and I thought about it and --

MR. HUGHES: I want to just say that I

MR. FLANNERY: August 19, your Honor.

MR. ALCH: I object to the form of the question, if the Court please.

THE COURT: No, the objection is overruled.

Q Please answer the question.

A At about 6:45 p.m. on August 19 I was watching Mattie Madonna's house.

MR. ALCH: I object, your Honor. I move for a mistrial. That is exactly what I attempted to obviate by my objection. It is irrelevant and immaterial. I would like to be heard further, if you will allow me to.

THE COURT: The objection is overruled and the motion for a mistrial is denied.

e 2 p.m.

Q Let me direct your attention to what has been marked Government's Exhibit 32A for identification and ask if you can recognize that.

A Yes, I do.

Q And will you tell me what that is?

A It is the house of Mattie Madonna, at 1180 Rheinlander Avenue in the Bronx.

MR. FLANNERY: I offer this.

MR. ALCH: Objection.

THE COURT: How do you recognize this? Is this where you were?

THE WITNESS: Yes, I was.

THE COURT: The objection is overruled.

(Government's Exhibit 32A was received in evidence.)

MR. FLANNERY: I will just pass this to the jury, your Honor.

MR. ALCH: Your Honor, before the questioning continues, may I be heard? I am in an awkward position. It is a very compromising position.

THE COURT: I am not placing you in a compromising position at all. I have stated the ground rules by which I am conducting this trial.

MR. ALCH: How can I make my record, your Honor?

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THE COURT: I have told you how to do that.

Q Mr. Toal, when you were on your surveillance at 6:45 --

MR. ALCH: I object and ask that the question be stricken. May I have a ruling, your Honor?

THE COURT: I think I should ask him what he did.

MR. FLANNERY: I withdraw the former question.

Q Tell us what you did and what you saw, Mr. Toal?

A I was watching Mattie Madonna's house.

MR. ALCH: I object and ask that it be stricken and ask for a mistrial.

THE COURT: The motion is denied, the motion for a mistrial is denied, and you needn't repeat it.

MR. ALCH: May I have a standing objection, as long as he is going to ask those kinds of questions?

THE COURT: You have a standing objection, as you know.

MR. ALCH: I don't know that, your Honor.

THE COURT: All right. You have it. Your motion is continuing and continues to be denied.

MR. ALCH: Thank you, your Honor.

A I was watching Mattie Madonna's house. I started watching it at about 6:45 p.m. At about 7:15 p.m. I saw a '75 gray Cadillac pull up in front of his house. I saw Mattie

mplt 3 Toal-direct

Madonna get out of the car and enter his house.

Q Had you recognized Mattie Madonna?

A Yes, I had.

Q Do you see him in this courtroom?

A Yes, I do.

MR. FLANNERY: May the record reflect the identification?

THE COURT: All right.

Q Now, how many people were in the Cadillac that drove up?

A Mattie Madonna got out of the passenger side and there was one other male driving the car.

Q Could you describe him?

A He was an Italian male about 45 years old, grayish-black hair.

Q What if anything else did you observe?

A I observed the Cadillac then leave the area, and about fifteen minutes later I observed Mattie Madonna coming out with his wife and a small child and they entered a 1976 blue Chrysler rented car. I followed them -- I followed them to City Island, a restaurant up at City Island.

Q And what happened then? How much longer did the surveillance continue?

A I followed them into the restaurant and observed

them having a drink, and then they were seated to have dinner and that's when I terminated surveillance for the night.

MR. FLANNERY: No further questions, your Honor.

MR. ALCH: I move to strike that entire testimony, if the Court please. What relevance does a man taking his wife and child to --

MR. FLANNER: I think if we don't --

THE COURT: Just a minute. I assume -- the only reason I am denying that motion is that I am going to accept his testimony subject to some other testimony in this case.

MR. ALCH: You will allow me to renew it if the situation warrants it later?

THE COURT: If it is not connected, you can renew it, and I will have it stricken sua sponte.

MR. ALCH: Your Honor, may I ask for an offer of proof from the government at this time?

THE COURT: No, I don't need that. I will accept it, as I have other evidence in the case, subject to connection.

All right. Do you want to examine this man?

CROSS EXAMINATION

BY MR. ALCH:

Q Agent Toal, did you arrest Mr. Madonna that night?

A No, I did not.

Q I take it that is because he committed no crime as you observed his activities during that night?

A That's right.

Q Did you continue watching him as he ate at the restaurant with his wife and child?

A No, I didn't.

Q How long did you stay in the restaurant observing him having dinner at this restaurant with his wife and child?

A I followed him into the bar part of the restaurant and watched him have a drink and when I saw he was seated, I left. I didn't see him seated at the table. I saw him being ushered into the dining area, and at that time I left.

Q With regard to your description of the man who was driving the automobile, I believe you referred to him as an "Italian male driver," is that correct?

A Yes, about 45 years old.

Q Did he have some type of sign on his person saying "I'm Italian"?

A No, he didn't.

Q Will you please tell me the basis of your conclusion that he was?

A He appeared to me to be of Italian extraction.

Q But you didn't say that when Mr. Flannery asked you for a description, did you, that he appeared to be, did you?

A I don't recall if I said the word "appeared" or not.

Q Well, what does "Italian" look like?

A I think I can differentiate an Italian from an Irishman or a black person.

Q Well, unfortunately, that's not the question.

I am asking you, what does an "Italian" look like to you?

A Dark complexion, usually black hair.

Q Usually black hair?

A Sometimes, yes.

Q Sometimes? Anything else?

A Nothing exceptional, no.

Q I fit those characteristics. Am I, in your opinion, Italian?

A I don't know.

Q How about the gentleman seated to my left, who is now standing? Is he Italian?

A He doesn't appear to be Italian.

Q What time did you observe this car pull in front of Mr. Madonna's home?

A About 7:15 p.m.

Q And Mr. Madonna wasn't driving, is that correct?

A That's correct.

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Q And to whom was this automobile registered, if you know?

A It was registered to Paul Cummando.

THE COURT: Address?

THE WITNESS: I think it was Geigrich Place, in the Bronx.

Q I take it -- I withdraw that.

How long have you been an agent?

A More than seven years.

Q And am I correct in that it is the usual custom -- yourself, anyway -- that when you see or do something in the pursuit of your official duties, you make a report, don't you?

A Sometimes, yes.

Q Well, did you make a report in this instance?

A Yes, I did.

Q Isn't it a fact that in your report, when you make reference to this automobile driving up to Mr. Madonna's home, you describe the driver of that car as -- and I quote -- "A John Doe, number one, approximately 45 years old"?

A Yes.

Q So in your report you didn't refer to this man as an unidentified Italian, did you?

A I don't believe I did. Just unidentified.

Q And is the reason for your conclusion of the

ethnic term "Italian" for purpose of this trial before the jury -- and I would ask that Mr. Flannery stop shaking his head -- the fact that you were told to do so by the prosecutor?

A I was asked if he looked Italian and I --

Q By whom?

A By the Assistant, Flannery.

Q Which Assistant?

A Flannery.

Q The fellow who was shaking his head when I asked the question?

A Yes.

Q And when were you asked this?

A About twenty minutes ago.

Q Twenty minutes ago? And I presume that when he mentioned the word "Italian" in his question you said "Yes," did you not?

A Yes, I did.

Q And I presume or is it not correct, that when you said "Yes, he did," Mr. Flannery said or suggested to you that you use the word "Italian" for describing the driver of the automobile?

A He asked me if the man appeared Italian and he told me he was going to ask me that question.

Q And when you said "Yes," he said in words or substance, "I want that in the answer," didn't he?

A Not in those words.

Q Not in those words necessarily, but wasn't that the substance of the conversation he had with you twenty minutes ago?

A He didn't say that.

Q What did he say before your testimony here regarding the description of the driver?

A He asked me about the driver of the car. He asked me, "Did he appear Italian?" And I said, "Yes, he appeared Italian." He said, "I am going to ask you that question on the stand," and I said, "Okay."

Q Have you ever discussed your testimony today, or whenever you were going to be called for this trial, with Mr. Flannery, before you had this conversation with him approximately twenty minutes ago?

The question calls for a yes or no answer.

A Very briefly, yes. We did not go into that part

Q On how many occasions didyou have a very brief conversation with Mr. Flannery concerning your description of the driver of that automobile prior to today?

A None.

Q Well, you said you had a conversation, a very

brief one, prior, about twenty minutes ago.

A About the whole surveillance.

Q Well, how many times?

A Very briefly, two or three times. He just asked me if I was on surveillance that night and he said he might call me as a witness.

Q And in none of these conversations did Mr. Flannery ask you, "Did the man look Italian?" Did he?

A If he did, I don't recall.

Q Did Mr. Flannery give you any reason for his desire that you inject the adjective "Italian" in your testimony today?

MR. FLANNERY: Objection, that's not the testimony, your Honor.

MR. ALCH: Let him answer. What's he afraid of?

MR. FLANNERY: I am not. I withdraw the objection.

THE COURT: All right.

A Will you repeat the question, please?

Q Did Mr. Flannery give you any reason for using the word "Italian" today, when he spoke to you about twenty minutes ago?

A No.

Q Now, you mentioned another vehicle, which was a 1976 blue Chrysler.

A Yes, an Avis Rent-A-Car.

Q An Avis Rent-A-Car. Did you determine who had rented the car?

A No, I didn't.

Q You made no effort to?

A No, I did not.

MR. ALCH: May I have a moment, please, your Honor?

(Pause.)

MR. ALCH: Your Honor, I have one request to make. Most respectfully, in view of this estimony might I ask for a copy of the material which your Honor perused earlier this morning?

MR. FLANNERY: I object.

THE COURT: No, I have already given my ruling on that.

MR. ALCH: Before the witness testified.

THE COURT: I understand that, but it doesn 't affect the ruling at all.

MR. ALCH: I would ask that this witness be kept reasonably available in the event that I wish to recall him for further cross.

THE COURT: All right.

MR. ALCH: Thank you.

THE COURT: Is there anything else?

MR. BROWN: I have one question, if I may.

CROSS-EXAMINATION

BY MR. BROWN:

Q This is my client. Does he look Italian?

A Yes.

Q Has he got black hair?

A I think he has dark brown hair.

Q That makes him Italian?

A It doesn't make him Italian.

Q What else?

A Features.

Q What about his features?

A It is not one specific thing. It is just that he appears Italian like Mr. Flannery appears to me to be Irish.

Q What do I appear to be?

A You appear to me to be maybe Jewish, although I'm not an authority on picking out what anybody is.

Q Well, I'm black, I'm black. Try that on your identification profile.

A I'm wrong. I did not claim to be an authority.

Q You are wrong.

Thank you, no further questions.

MR. LIPPEL: I have no questions.

MR. FLANNERY: Just a couple of questions, your Honor.

REDIRECT EXAMINATION

BY MR. FLANNERY:

Q Do you know the name of Mr. Commando's father-in-law?

A Yes, I do.

Q What is that name?

A Mario Sterace.

Q Do you know how old he is?

A He's in his forties, late forties, I believe.

Q Did you get a clear look at the man in the car with Mr. Madonna?

A A fairly good look.

Q Do you know what Mr. Sterace looks like?

A No, I don't.

Q So you couldn't tell whether or not that was Mr. Sterace?

A No, I don't know what Mr. Sterace looks like.

MR. FLANNERY: I have no further questions, your Honor.

THE COURT: All right, thank you. You may step down.

[Witness excused.]

THE COURT: Call your next witness.

MR. FLANNERY: The Government calls Eugene Travers.

A F T E R N O O N S E S S I O N

[2:00 p.m.]

THE COURT: I have been unable to talk to Judge Meanor. I guess he takes a different lunch hour than I do and he was on the bench. I have this number and if he calls I'll take the call.

I will make my ruling now on the Viseglie testimony insofar as it relates to the transaction in 1971 and 1972, allegedly, and what he is supposed to testify about allegedly involving Mr. Larca and Mr. Madonna.

The rule of this Circuit, as you know, is inclusory and Iwould have problems about this if it was Mr. Larca alone who was involved, because I think insofar as his testimony is concerned the issue as to him is largely going to involve the credibility of Boriello. I have no question that it is admissible aso to Mr. Madonna, however, and in view of the fact that they were supposed to be working together under those circumstances I'm going to admit the evidence with, of course, a limiting instruction. I think that the time is four to five years earlier. The substance in the transaction is the same as that involved here.

Mr. Alch, I believe, has put the issue of

intent in question and under those circumstances I think that the probative value of the information, whatever prejudicial effect it would have, I'm going to make clear to the jury whenever the testimony is given its limited use in instructions both then, which I will try to make clear, and in my charge.

MR. ALCH: Your Honor, by allowing that evidence are you finding that a prima facie case on conspiracy has been made at this point?

THE COURT: That is not the issue.

MR. ALCH: I'm inquiring, your Honor.

THE COURT: That is not the issue in terms of the evidence being admitted. That is not the issue now. The question in this case is whether or not a prior similar act is admissible. That is the issue that I'm addressing myself to, but not yet as to whether a prima facie case has been established.

MR. ALCH: I believe you indicated that you would charge the jury in substance -- I have a suggested charge which I will hand up if your Honor wishes -- I thought you said that you would instruct the jury that before they could consider the alleged similar act they must first find the defendant committed the crime on which the defendant is presently charged.

A Yes.

Q What did he say and what did you say?

A I said to him "The deal is no good. The guy didn't come up with the money."

THE COURT: Who is "him" now?

Q Who is the person you are speaking to?

A Mattie.

Q Identify the speaker.

A Identify what?

Q Identify the speaker who is speaking. Who said what?

A I spoke first. Mattie walked into the bar and I says to him, "The guy didn't come up with the money."

Mattie got a little irritable and just said "I don't want you to bother with me no more."

That is it. He walked out of the bar.

MR. FLANNERY: I have no further questions, your Honor.

THE COURT: All right.

Ladies and gentlemen, I have to give you some specific instructions on how you are to receive that testimony. That testimony involved some acts that Mr. Madonna and Mr. Larca are alleged to have done in, I think,

1972. They are not charged with that. The acts that they are charged with occurred in 1976. You cannot, therefore, use or consider that testimony to determine in your own mind whether or not it has been established that they did the acts that they are charged with in 1976, nor can you use that testimony for any purpose whatsoever unless and until you find that they have done the acts that are charged as having taken place in 1976.

If you find that they have done those acts you may, but you are not required to, then use the testimony as to the acts that occurred in 1972 to determine their knowledge and intent with which they did the acts with they are charged.

Is that clear? One, you are not to use this testimony in any way to determine in your minds whether they have done the acts with which they are now charged. It is only after you have made that determination that you can use this testimony to determine the intent with which they did the acts with which they are now charged, and this testimony can only be used in reference to Mr. Madonna and Mr. Larca with the steps that I have outlined for you. It cannot be used in any way and does not affect in any way Mr. Klinger.

MP 2

take, I make this motion for a directed judgment of acquittal, and I will go no further than to say that I have read the evidence, and I know that your Honor has as well; your Honor has his notes, and that is the end of my motion.

THE COURT: All right. Do you wish to state your motions now, Mr. Alch? It is up to you as to the order in which you wish to proceed.

MR. ALCH: May it please the Court, based on the representation by the Government that there will be no other testimony in this case in chief other ahtn the bank records keeper, I would first move that the testimony of Agent Toal be stricken.

THE COURT: Agent Toal?

MR. ALCH: He was the agent who testified to a surveillance at Mr. Madonna's house on the afternoon of the 19th. Your Honor took it subject to connection, and it was my objection that the inference that arose from prior surveillance was prejudicial, and I submit, your Honor, that there has been no evidence subsequent to Agent Toal's testimony to connect it as being relevant.

THE COURT: When was this surveillance, again?

MR. FLANNERY: The 19th, your Honor, at seven-fifteen in the evening.

THE COURT: All right.

MP 3

Mr. Madonna's involvement is all at this point by circumstantial evidence and by inference, but the inferences are very strong. He rents a car in another name the night before he meets Mr. Boriello at Larca's house the next day. The car that he has re ed is turned over to Boriello, and that car is used to transport what is believed to be narcotics, and when it has what is believed to be narcotics, it is then turned over to Mr. Madonna and Mr. Larca.

I don't see any basis at this stage of the pleadings in the case where a motion to dismiss as to him can be granted.

I might as well deal with this other problem: of surveillance, and the motion to strike the testimony of Agent Toal with regard to the surveillance is denied.

All right. Do you gentlemen have any better idea as to the length of the rest of the case? Do you think the presentation of your evidence will take two days: Wednesday and Thursday?

MR. ALCH: I believe so, your Honor.

THE COURT: My own feeling would be that if it is going to take Wednesday and Thursday, what I would want to do is to have Friday for argument, summation, if that is agreeable. If your testimony will go into Thursday, then I will have the argument, or summations, on Friday.

Q By whom?

A Ralph.

Q Did you have a conversation with Joseph Boriello at that time?

A I told him -- well, he sat down. He sat down next to me --

Q Tell us just what happened. Take your time.

A Okay. He sat down next to me and I said, "Don't be shy,dig in," because we had sandwiches. There was a lot of cold cuts on the table. He started to make a sandwich. We sat down. Most of the talk was really idle. I told him he looked really bad, he looked terrible. He said he was exhausted physically because he had a jet lag.

Q Did he describe that?

A I said, "Oh" --

Q Speak up and tell us what the conversation was.

A Okay. I said to him, "You got" -- I says, "You really look terrible."

He said to me he has jet lag.

I said you really look bad. What are you going -- you know, why don't you take off, why don't you take off, why don't you go home?"

He said, "I can't right now because I first

want to borrow a car and then I want to take off." He says, "I've got a few things to take care of first. I can't go right home."

I said, "Where did you go"?

He told me Hawaii. He really looked bad.

I asked him about the airport, because I remember when I was there -- I asked him a question about it. I said, "Do they still have those carved hedges that they make out of animals?"

When I was there, I was there for about five or six hours, seven hours, something like that, they have these carved hedges.

Q When were you there?

A I stopped there for about nine hours. I was there when I was shipping, being shipped back from Vietnam.

Q That is all you saw?

A They wouldn't let us out of the airport.

Q Did you discuss that with Joe?

A Yes.

Q After you had the discussion with him what, if anything, did you observe?

A That is when he said to me, "Well, I'm going to get going soon," and I guess he maybe had another cup of coffee and then a few minutes later he said to

adonna

Sal, "Could I have the keys now?"

And Sal went into the house and came back out handed him the keys. Joe said, "Where is the car"? He said "It's up the block," and he pointed and Joe got up and he left.

Q Did Joe leave alone?

A I guess so, because Sal was right back.

Q Did Sal leave with him?

A He got up and said "I'll show you where it is. It is up the block," and Joe got up with Sal and he said goodbye to everybody. He said, you know, "Goodbye, nice meeting you, nice meeting you," and he got up and walked away.

Q Could you tell us how Sal was dressed on that occasion?

A A bathing suit. I guess cut-offs, because that is what he wears most of the time, cut-offs.

Q Cut off what?

A Dungarees.

Q What then happened, if you recall?

A About maybe an hour later, 45 minutes later or so, I heard Mattie yelling to Sal outside.

Q What was said? Speak up, sir.

A He was outside and he was carrying on. He

got a little upset for some reason.

Q What was said? What, if anything, did you hear?

A What I heard --

MR. FLANNERY: I am going to object to hearsay now.

MR. BROWN: He is talking about --

A This is what I heard.

MR. FLANNERY: That is why I'm objecting.

MR. BROWN: It is not hearsay.

MR. FLANNERY: We were talking about Mr. Boriello. We are not talking about Mr. Boriello any longer.

MR. BROWN: We are talking about a co-conspirator, allegedly.

MR. FLANNERY: I'm sorry, your Honor, but I don't believe this gentleman is a co-conspirator. He hasn't been charged.

MR. BROWN: That is not the measure of the rule.

THE COURT: No. I think from what I can understand Mr. Larca to be testifying to it is these conversations with Mr.Boriello which were admissible. Now he has introduced someone else. I thought he said Mattie.

MR. BROWN: He did.

THE COURT: And if he is now saying the conversation -- you are talking about Mr. Madonna?

THE WITNESS: Yes, sir.

THE COURT: If he is talking about conversation, what Mr. Madonna said --

MR. FLANNERY: That is why I'm objecting. That is hearsay.

MR. BROWN: Not hearsay. It is within the exception.

MR. FLANNERY: It is certainly not, unless he is going to tell us about an admission of Mr. Madonna.

THE COURT: He has a right to testify. The Government may say anything Mr. Madonna said was an admission.

MR. FLANNERY: I would like to have an offer of proof.

MR. BROWN: When did that become popular?

MR. FLANNERY: It is not a legal fact.

MR. BROWN: It certainly is.

THE COURT: All right, I'll hear you at the side bar.

[At the side bar:]

MR. BROWN: If your Honor pleases, in the first place, this is a narrative being offered, not

necessarily for the truth of the statement but to explain the total circumstances which have already been introduced and which have been gone into by the Government. It is also dealing with two people, Larca and Madonna, who are co-conspirators here and there is no hearsay restriction on their testimony. He can tell what he heard them say.

THE COURT: I understand that.

MR. FLANNERY: It is an extra judicial declaration by an individual who is not available for cross-examination. The statements of Madonna and Larca are not subject to cross-examination. Mr. Boriello was on the stand. He was subject to cross-examination and the statements that he made, what he said they said to him in the course of this conspiracy. This gentleman is not involved in the conspiracy. The statements he offers, I submit, are probably self-serving statements and for that reason not admissible.

MR. BROWN: The agents certainly testified to what Madonna said.

MR. FLANNERY: They were testifying to admissions, false exculpatory statements and admissions.

MR. BROWN: It is exclusion of the Government. It is for the jury to determine.

THE COURT: Wait a minute. I think I'm going

to have to get your authority on that.

MR. BROWN: When he allowed the agents to talk about Mr. Madonna --

THE COURT: There may be a point to it, Mr. Brown. The point is that you are putting a man on to testify. He is going to testify about conversations about what somebody else said and it is true that that person can't be subject to any kind of cross-examination. The point is about the hearsay, it is a hearsay statement being admissible, hearsay statements that are made during the course of a conspiracy and made by participants in it may be admitted into evidence.

MR. BROWN: If a man is on a street corner and hears one of these defendants say something, he could put it into evidence.

If someone in the course of the investigation or the event heard something on a street corner -- many of the witnesses we have had here are those who testified --

THE COURT: Give me an example.

MR. FLANNERY: If it were an admission.

MR. BROWN: Let's assume if someone standing on a street corner had heard Madonna say something such as "I'm angry about that car," then they would want it in

as a form of admission. In the concept of what an admission is, an admission is for the jury to determine. Here what this man will say is " Why did you give him the car?" Or something like that. That is part and parcel of what has been said here and may be construed as an admission against interest in the context of this.

MR. FLANNERY: It seems to me it is more likely to be construed as an exculpatory statement. Any person in the conspiracy can, of course, testify as to admissions. The problem with hearsay is the reliability of the extra judicial declaration

THE COURT: I must confess that I have listened and this is one issue that I'm not very clear on. I think you are going to have to give me basis for it. You will have to defer on that until I am clear on it. I'm not clear on this at all. You may have a point.

MR. BROWN: How can he have a point? The statements of the people who are in the conspiracy are admissible.

THE COURT: That is generally in furtherance of the conspiracy.

MR. BROWN: No, it is anything that is admissible with respect to the conspiracy. This may be in furtherance.

THE COURT: Generally you have either a co-conspirator or someone who is indicted making a statement in the testimony.

MR. BROWN: Not necessarily. We have informers. Let me give you an example.

THE COURT: You subject them to vigorous cross-examination.

MR. BROWN: Boriello's testimony has gone in with respect to them. He has been subjected to cross-examination. Then we have a man on a prior similar act, His testimony is not hearsay. It is just unreal that you should bar it. That is not even within the conspiracy, so technically he shouldn't have been allowed to say anything that Sal and the other man said and I objected at that time.

THE COURT: You may have a point. I have to be very cautious about this. We are going to have to defer it, I'm afraid, until I can brief myself on it, satisfy myself one way or the other.

MR. BROWN: Let me give you another example: On the prior similar act, how was Visceglie allowed to say what Madonna said?

MR. FLANNERY: He is testifying about admissions during the course of the prior similar act.

MR. BROWN: It is still hearsay. You don't waive all the rules of evidence merely because it is a category.

MR. FLANNERY: That is an exception to the hearsay rule.

MR. BROWN: That is not.

MR. FLANNERY: It certainly is.

MR. ALCH: Can I make one comment?

THE COURT: You can make a comment, but if you have any case law on the subject I want it.

MR. FLANNERY: Sure. I can gather it in a few minutes. I'm certain that the rules list the categories.

THE COURT: I'll look it up myself. You can defer it for a few minutes and then I can satisfy myself about it.

MR. ALCH: I was going to say simply that it was a conversation describing act of a transaction which the Government has characterized as being in furterance of a conspiracy. It is not offered for the truth of it. It is a statement describing an event.

THE COURT: You may be right, but, as I said, it is strange to me and is something that I haven't confronted in my own mind.

MR. FLANNERY: Can I make one final point

about it not being offered for the truth of the matter. There are situations where people engage in a conversation where one is making an admission, the defendant is in a conversation with an agent, as with Mr. Digravia. Sometimes it is not offered forthe proof of the matter asserted. However, the other person's statements which are exceptions to the hearsay rule are admissible. That kind of hearsay is considered reliable, whereas other statements are not considered reliable.

THE COURT: I think we ought to be able to defer this and just give me a chance to satisfy myself.

MR. BROWN: He is primarily asked to describe what happened on that afternoon. I'll find something else.

THE COURT: If you want, we will take fifteen minutes, we will recess now.

MR. BROWN: That makes sense, Judge.

MR. FLANNERY: Yes.

THE COURT: All right.

[In open court:]

THE COURT: Ladies and gentlemen, I'm frank to tell you a problem has come up and I'm not at the present time prepared to rule one way or another and I'm going to take fifteen minutes now to satisfy myself on

the point and then you'll come back. We will recess for fifteen minutes, if you'll bear with me.

[Recess.]

[Continued on next page.]

(In the absence of the jury.)

MR. BROWN: Judge, I want to add one factor before you make a decision. In terms of the Rule 803, there is one category which definitely fits the description which would be developed. What he would have said was it was a highly excitable situation, greater irritability and it would be demonstrated that it involved a high state of excitement, which would come under the exception to Rule 803.

THE COURT: I think, Mr. Brown -- I am very surprised -- this is the first time I have faced this situation.

The applicable rule appears to be Rule 801.

MR. BROWN: As modified by 803, Judge.

THE COURT: 801 gives us the definition of what is excluded from hearsay. 801(d)(2)(a) indicates that a non-hearsay statement, a statement made by someone, which is admissible, has to be a statement that is offered against a party, and it is on this basis, as far as I can understand the rationale of the application to co-conspirators is, one, a statement offered against a party, and two, the basis of an agency relationship.

MR. BROWN: Except, Judge, we find 803, which has changed the hearsay rule, and it gives the exception of an excited utterance.

803 is the new federal rule that expands the exception of hearsay and exceptions thereto, and of course it has caused a great deal of trouble.

I am reading in a superficial way from the '76 supplement, and it is pointed out that in any rule as lengthy as 803, there are exceptions.

United States v. Smith is dealt with here, they also discuss U.S. v. Napier.

THE COURT: Well, an excited utterance cannot be applicable, because the only person who is telling us that the utterance was excited is the witness himself.

MR. BROWN: Yes, sir, but that's how it is put within the hearsay exception in 803.

THE COURT: I believe, Mr. Brown, that what we have to have is some evidence to show that this was a situation in which there was some stress and excitement before I could allow it.

MR. BROWN: May I offer it? You have it in the instance of the description of Mr. -- no, I will withdraw that. I'm sorry. I made a misstatement of fact. But that's where we establish the excited utterance by the explanation a person gives. There is no other way than the observer of the scene.

THE COURT: I can see if there is a situation

where several people observed what occurred, if there is an accident and a statement is made and so forth and so on, that is something else. But I don't see this coming within the rules.

As far as I can understand the interpretation of 801, as to hearsay, it seems to be clear that it has to be offered against a party -- against a party. That's one of the principal bases for admissibility.

MR. BROWN: But the rule says "The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

"1. Present sense impression. A statement describing or explaining an event or condition" --

THE COURT: I read that.

MR. BROWN: That is an exception. That is what 803 does. It broadens the hearsay concept. What else can it be but describing an event or condition, and therefore, under the new rules, it comes clearly within 803.

And then, two, there is the excited utterance, and any existing mental or emotional or physical condition, which is three. Not including a statement of memory or belief.

Judge, there have got to be exceptions to the hearsay rule, because the new rule, 803, says so.

THE COURT: Of course there are exceptions to the

hearsay rule. I don't believe -- I have heard you recite those things, but they do not come within the exceptions to 803.

MR. BROWN: Judge, may I give you the Napier case?

581 F. 2nd 316. This is a case under excited utterance. They say it was decided before the effective date of the rules.

The statement was admitted over objection.

This is right on the point, Judge,and that's a week after the event, a statement made to a sister when viewing a photograph.

Now, here we have a young man who is within almost a res gestae situation, that whole day, talking about what a co-defendant said and did, in terms of his manner, in terms of his appearance and in terms of an expression of surprise and deep concern, a startled utterance.

Now, in the Napier, that is, the Napier case, when we were talking about an excited utterance. There, because it wasn't an excited utterance, the statement that she made wasn't an excited utterance, and the Court of Appeals reversed the conviction.

Now, what they are saying, Judge, I think -- and I am not trying to talk as positively as I may sound because

it is a gray area. I read Weinstein on it, and I have read this today, and what it does seem to say, however, with all the intellectual qualities I can muster, is that under our rules, 803 says, no more judge-made rules. If it is an excited utterance, if it is describing the sense of the person's attitude and the first factor, which includes, Judge, present sense or impression, a statement explaining or describing a state or event or condition.

Judge, I really cannot see, with my limited knowledge, how one can go beyond the clear language that if it is excitable -- and of course the Napier and the Smith cases are all on point -- and if it is talking about an existing mental or emotional condition, it goes beyond the rule.

I know it is subject to modification but it says our rules now allow this.

All that he said up to now is that he was highly irritated and I can tell you from what I know, he is going to say he was startled by a piece of information, which is so critical to the case, Judge, which deals with someone discovering that someone had loaned his car.

THE COURT: My reaction to it is that it is too subjective.

MR. BROWN: That's why the rule makes it trustworthy.

THE COURT: No. The fact that you call it excited and so forth, there are no circumstances that appear to me that merely because a friend of his lent a car to somebody else, that this should produce the startled and excited statement which 803 deals with. No.

Mr. Madonna may have been annoyed and angry, but the theory and the rationale of the excited utterance is not a subjective thing, but by objective circumstances to indicate that it was something which would under ordinary circumstances have people speak spontaneously and therefore there would be no basis -- for that reason it would be reliable.

I do not regard the fact that Mr. Larca gave a car that he had rented to somebody else as being within the rule.

MR. BROWN: Judge, that's not the whole rule. How about number one?

THE COURT: Number one in this instance --

MR. BROWN: Observing what happened.

THE COURT: It is a self-serving statement, which you want to get in.

MR. BROWN: How about the state of mind? The rule says you can show that. I will attempt to elicit from the witness what he observed, Judge, which I think he has a right to describe.

THE COURT: Mr. Brown, it is a gray area, and it

is an area with which I must confess I am not entirely familiar, but the further the argument goes, the more I am convinced that I am right.

MR. FLANNERY: May I say one thing about the Napier case?

MR. BROWN: Well, the winner doesn't have to give back the medals. This is so critical to our case that I think we have to do something. May we have the testimony outside the presence of the jury?

THE COURT: Of course, I will allow that.

MR. FLANNERY: May I make just one comment about the Napier case which has been referred to?

There are a number of facts there that are not present here. Two brain operations, a person who was not identified, and the statement of the woman that this person was responsible for her death.

THE COURT: These are not situations under which that kind of utterance would be allowed.

MR. FLANNERY: Of course, I will be given an opportunity to cross examine him at this hearing?

MR. BROWN: Why not? It seems fair enough.

THE COURT: Of course.

BY MR. BROWN:

Q Mr. Larca, you were about to describe what occurred as you heard Mr. Madonna come into the area of the home, and what happened, is that correct?

A Yes.

Q Now, the Judge is allowing me to have you do this outside the presence of the jury, for reasons that you need not be concerned with.

Tell us what happened. Start at the point where you were about to express yourself.

A All right.

First of all, he didn't actually come in. He was outside the front gate.

Q All right. Tell us.

A Well, I could see right through the gate. I saw he had his hands up like this (indicating) and at one point I heard him yelling at my brother, he was really kind of upset, and one thing which stuck in my mind, which I was able to hear, which was, "How could you lend somebody I don't even know my car?"

Q Now, will you tell us what the whole flavor of that situation was? I saw you using your hands.

A Yes. When he first was there, he started going like, you know --

Q Would you describe it?

A He was pretty upset. He was pretty irritated.

THE COURT: You can sit down.

Q What happened after that?

A Then I guess he left, and my brother came in.

Q Whom was he talking to when he acted as you have described?

A My brother Sal.

Q And they were just outside the gate?

A Yes, sir.

Q Did you hear him say what car he was referring to?

A No, sir.

MR. BROWN: All right. That would be the total of my offer of proof.

BY MR. FLANNERY:

Q Did you review your testimony with anyone before you came here today?

A Yes, sir.

Q With whom?

A A Mr. Delaney.

Q How many times did you speak with him?

A I spoke to him three times.

Q How recently?

A Yesterday.

Q Was yesterday the first time that you spoke to him on these three occasions?

A No, sir. I spoke to him, once I went down to a lawyer's office. I don't remember --

Q Do you remember which lawyer's office you went to?

A No. He just asked me my name and what I knew about the case, but I never got to say anything.

Q About when did that occur, that you went to his office?

A Oh, about three weeks ago or so. Two or three weeks ago.

Q Who was present when you went to the office besides Mr. Delaney?

A Who was present when I was speaking to Mr. Delaney?

Q Who was present when you were speaking to Mr. Delaney?

A Just Mr. Delaney.

Q Did Mr. Delaney take notes while you were talking to him?

A He took my name and address and said he couldn't finish, he didn't have time, and if at all possible, if he could meet me and anyone else who was present at my brother's home the following day, which was Sunday, and I said yes.

Q And you say you met him on two other occasions. When was the next time?

A The second day was the following day: Sunday.

Q Who was present then?

A Mr. Delaney, my brother Fred and my brother Sal and Ralph, Ralph Battista, and that's it.

Q At that time, did you all talk to Mr. Delaney about the events of what happened on the 20th?

A Well, he asked us to sit down at the table we were sitting at that day, and he asked us "Do you remember who was sitting where at the time?"

THE COURT: I don't think that's necessary.

MR. BROWN: That's not the point.

MR. FLANNERY: I will restrict it to what he has testified to. I am sorry. I don't want this to turn into regular cross.

Q Let me direct your attention to what you have described at this hearing.

Did you talk about that at that time?

A No.

Q You didn't mention it to him?

A No.

Q Did you mention it in the first meeting you had with Mr. Delaney?

A No. I didn't have a chance to. He just took my name.

Q When did you tell him about it?

A Yesterday.

Q Yesterday is the first time?

A Yes. He said, "Try and remember everything that took place on that day."

Q When is the first time that you told about the keys being given away that resulted in this situation?

A Yesterday.

Q Yesterday was the first time?

A Yes.

Q And was anybody else present except Mr. Delaney when he told you that?

A No.

MR. BROWN: I object to this, Judge. This sounds like a general cross examination.

MR. FLANNERY: He referred to the keys.

THE COURT: Yes.

Q Did Mr. Delaney take down any notes when you told him about this yesterday?

A Yes.

Q Where did you tell him this?

A At his room.

Q In the hotel?

A Yes, sir.

Q Was anybody else present when you told him this?

A No.

Q Were there any tape recording devices?

A No, sir.

Q Did you speak to Mr. Brown about your testimony before you took the stand today?

A No.

Q You didn't talk to Mr. Brown until you took the stand this morning, is that your testimony?

A Yes, sir.

Could I explain one thing? He didn't ask me about my whole testimony.

Q I am only referring to this one isolated incident.

A No.

Q He didn't ask you anything about that?

A He didn't go into regard of what I had to testify about. He asked me, "Were you there at the time?" And I said, "Yes."

Q Did you have a conversation with -- do you have a brother Freddy, is that correct?

A Yes, sir.

Q And has he been in this courtroom during the trial

He is not here now, but he's been here during the trial.

MR. BROWN: If that's a statement of fact, we have no knowledge of it, Judge.

THE WITNESS: I don't think so.

MR. FLANNERY: I am asking him.

MR. BROWN: Oh, it's a question?

Q Have you spoken to anybody about your testimony during this trial?

THE COURT: This is limited to the specific point. You will have an opportunity to cross examine him fully before the jury.

MR. FLANNERY: I'm sorry that I crossed the line, your Honor.

THE COURT: The only thing you can ask him about is Mr. Madonna's statement.

Q You said that Mr. Madonna was excited?

A Yes, sir.

Q Where were you standing when this happened?

A I was sitting.

Q Where were you sitting?

A At the table.

Q Could you refer to this chart. It is rough --

THE COURT: Can you see it from there?

MR. BROWN: Judge, I object to this. This is only

an offer of proof for the purpose of establishing what was said so that the rule can be later seen in its correct light. We haven't even gone into this.

THE COURT: Well, I agree.

MR. BROWN: I don't even know if he is going to accept that.

THE COURT: All that I understand that Mr. Larca did say is that the statement was made at the gate.

MR. BROWN: Yes. We have in evidence that we offered.

THE COURT: And I gather all that Mr. Flannery is trying to establish is where he was in relation to the statement.

MR. FLANNERY: That's correct, your Honor.

Q Where were you on this chart?

A I can't see it.

Q Will you come off the stand?

MR. BROWN: We have no evidence that that chart is accurate.

Q Where were you in relation to the annex or the main house?

A I don't know what you're referring to as the "annex"?

THE COURT: Well, where was it in relation to the

gate?

THE WITNESS: Well, I was sitting at the table. I can see the table. It's round, and he was at the main gate.

THE COURT: The table was located close to the pool?

THE WITNESS: Not directly next to it. It is a little bit away.

Q How many feet were you from the gate?

A About from here to the back wall.

Q You said you had some trouble seeing the chart. Do you wear glasses?

A No.

Q You said you overheard the conversation. What was it heard Mr. Madonna say?

A He said, "How can you lend somebody I don't know the car?"

Q That's the first thing he said?

A No, I heard his voice, and he was pretty loud, and he was motioning and he put his hands up.

Q You saw your brother Sal Larca speak to him before you heard his voice?

A No. I heard Mr. Madonna first. I couldn't make out exactly what he was saying at first, the entire conversation, but at one point I did hear him clearly say, "How can

you lend somebody I don't know my car?"

Q You may have testified to this, and if you did, I am sorry, but what time did you say the conversation occurred?

A Oh, maybe a quarter to 3, or 3 o'clock. About that time.

Q And your brother was inside the grounds at this time, is that correct? Your brother was inside the gate at a quarter to 3?

A No, he was outside with --

Q I mean, he was at the gate at a quarter to 3?

A No. He was outside.

Q He was outside the gate at a quarter to 3?

A Yes.

Q You are certain of the time?

A I am not positive, but it was about that.

Q Could it have been a quarter to 2 or 1:30?

A No.

Q Is it your testimony that at 3 o'clock Mr. Boriello had left?

A No, sir.

Q Mr. Boriello was there?

A No, he left already. He was there only about half an hour.

Q So Mr. Boriello was gone by 3 o'clock?

A He had left an hour or so before that. He had left about a quarter after 2.

Q Did your brother leave the grounds at all that afternoon while you were there?

THE COURT: Wait a minute now.

MR. FLANNERY: I'm sorry.

THE COURT: You are going far beyond the inquiry--get the jury.

MR. FLANNERY: I object to the testimony, your Honor. Are you going to exclude it?

THE COURT: I have already ruled. My indication is that it is going to be excluded. Yes. I am going to uphold the objection.

MR. BROWN: We have an exception under 801 and 803.

(Jury present.)

THE COURT: I am sorry for the delay, ladies and gentlemen. The objection is sustained.

DIRECT EXAMINATION CONTINUED

BY MR. BROWN:

Q Mr. Larca, you did say you saw Mr. Madonna at those premises, is that right?

A Yes, sir.

A They walked towards the gate, and Joe left.

Q Who walked towards the gate?

A Sal and Joe.

Q Did they go outside the gate?

A No, sir.

Q Who went out, if anyone did?

A Joe.

Q And what happened after Joe left?

Did Sal then return and sit down again or what?

A Yes. He came back to the table.

Q Now, who was there now, and about what time was this?

A Oh, about twenty after 2.

Q Twenty after 2?

A I don't know exactly.

Q Approximately. You didn't look at your watch, but that's your best approximation, is that right?

A Yes.

Q What happens now, if anything?

A What happens now?

Q Yes. Your brother has left, Sal has come back, what happened now?

A Everybody is sitting at the table, eating, getting up, going in the pool. About 45 minutes later, I heard Mattie

at the gate.

Q Mattie who?

A Madonna.

MR. FLANNERY: Objection, your Honor.

MR. BROWN: This is someone listed as a co-conspirator.

MR. FLANNERY: The same situation applies.

MR. BROWN: It cannot possibly.

THE COURT: The objection is sustained on the same ground as we had this morning.

MR. BROWN: Judge, this is a different --

THE COURT: The objection is sustained.

Q Would you describe what happened, without giving us words?

THE COURT: I am not going to allow that.

MR. BROWN: He can't describe what he saw, Judge.

THE COURT: I'm not going to allow that. If he says that Mr. Madonna was at the gate, that's all right.

Q Can you describe his appearance and actions at the gate?

Hold on. Allow the Judge to rule.

THE COURT: I am not going to allow that.

MR. BROWN: I am asking it for the objection.

THE COURT: I understand.

Q Could you see Mr. Madonna when he came to the gate?

A Not just when he came to the gate. A little bit after.

Q Where was he when you saw him?

A He was standing in front of the gate.

Q Was anyone here with him?

A Sal was with him.

Q Were you there?

A Sal was with him.

Q And how far away were you?

A 50 feet, 60 feet --

Q How much?

A 50 or 60 feet.

Q 50 or 60 feet. Could you hear what was being said? Answer yes or no.

A Parts of it.

Q Pardon?

A Parts of it.

Q You could hear parts of it?

A Yes, sir.

Q And so that if you were permitted you could tell us what parts you heard?

A That's right.

Q But you understand that the Judge has ruled and you will not tell me that. Is that clear?

A Yes.

Q Now, after you saw and heard whatever you heard or at the time you heard whatever you heard, can you describe to us the physical aspect of the persons who were near the gate, that is to say, Salvatore Larca --

MR. FLANNERY: Objection to leading.

MR. BROWN: I am not leading anything.

MR. FLANNERY: I think you are.

THE COURT: Ask him the questions.

MR. BROWN: I am asking the questions.

THE COURT: Mr. Brown, you are leading and you kno you are leading, so let's not have any problem about that. The point is, ask him questions and let him answer.

Q What did you se..

THE COURT: He has testified. He told us what he saw and I have indicated that I am not going to allow that. He saw Mr. Madonna with Mr. Larca and he saw them in conversation. There is nothing else that he can testify to.

MR. BROWN: I will ask the question so the record shows it.

Q Were you able to see what actions in terms of arms, expressions and body that Mr. Madonna and Mr. Larca --

MR. FLANNERY: Objection.

MR. BROWN: I have to ask the question, Judge.

THE COURT: Objection sustained.

Q Were you facing these men?

A Oh, no. I couldn't see them when they first got there, because the table -- you can't look right there, you have to look at the side.

Q Did you see them when they had a conversation?

A Yes, sir.

Q What was their position? Were they face to face?

A Yes, sir.

Q Could you see what actions they took in terms of arms and so forth?

A They were making --

Q Don't tell me what. Could you see?

THE COURT: Just yes or no.

A Yes.

Q Now, I want to ask you the question, and I want you to hold your answer.

Could you tell us then what Mr. Madonna and Mr. Larca were doing in terms of their hands and their expressions?

Now, will you tell us that?

MR. FLANNERY: Objection, your Honor.

THE COURT: The objection is sustained.

Q Now, will you tell us that?

MR. BROWN: The objection is made. It's sustained. All right.

Q Now, as far as that situation was concerned, can you tell us whether it occurred on any part of the photograph, Exhibit A in evidence, that is visible? Is it possible for you to mark where they were when they said whatever they said, on that photograph?

A Yes.

Q It is?

A Yes, sir.

Q Will you mark L and M for Larca and Madonna?

A It's already there. There's already an M on there, sir.

Q All right. Good.

A I didn't put it there.

THE COURT: Let's spend an extra few minutes and get these requests out of the way.

(In the robing room:)

THE COURT: Sit down, please, gentlemen.

Evidently, this man was supposed to be away from May the 12th to June the 2nd, from the letter, and it shows he had treatment --

MR. BROWN: Judge, the latter part of April and May is what we are concerned about, sir.

THE COURT: Well, the letter is dated May 6th. He has made remarkable progress, according to this, since admission.

This letter would appear to indicate that on May the 6th, the letter being written with regard to him -- it would indicate he had been around and was leaving on May 12th and would return in June.

Also, it shows treatments in June. 10 June.

MR. BROWN: Our information was that he had been in attendance almost daily in April and May. That is why he made good progress, right up through the first week in May, and those are the weeks he said he was away.

If your Honor please, on 109, 112, 116, 241 and 242, Mr. Boriello stated that he was away the last week of April and the first week of May.

MP 14

THE COURT: Well, this shows that that is in error, but he apparently was away. From this letter, he indicated he was leaving on the 12th.

MR. BROWN: We all concede that's true. He did make the May 12th, but my questioning was prior to May 12th, because it bears a stamp of May 12th.

We would like to introduce whatever appropriate parts would show that he was still here and had not left the last week in April and the first week in May.

THE COURT: All right. Well, I think what you can do, I think you can make a stipulation.

I have called there, and I haven't been able to get this gentleman, whatever his name is, and I have asked for the records, and evidently there was a misunderstanding, and we will get them tomorrow.

Here: you can look at it. You and Mr. Flannery ought to be able to agree that he was here in that period.

MR. BROWN: Would you have any problem with that?

MR. FLANNERY: We can do it afterwards.

THE COURT: That letter is dated May the 6th, which seems to indicate that he had been in attendance, and also they are giving him permission to leave.

All right. Let me go down the instructions.

As to Madonna, Request Number 1, granted in sub-

stance. I don't want to mislead anybody, that that means that I am going to use your language or anything like that. I am going to give you the charge, but in my own language.

MR. FLANNERY: Your Honor, I don't know what that charge is.

MR. BROWN: Do you want to share this, to look at it with me?

THE COURT: All right?

MR. FLANNERY: Yes, your Honor.

THE COURT: Number 2 is denied. Godfrey versus the United States has held that any such instruction as that is reversible error.

Request Number 3, in substance.

Number 4 in substance.

Now, I don't understand Number 5, because I don't get the impression -- the Government has not alleged any aiding and abetting. That is not charged. The Government has not cited the statute that would indicate that. I assume you don't want me to charge it.

MR. ALCH: Strike the words "aiding and abetting", and just rephrase it to refer to the element of possession, knowledgeable possession.

THE COURT: Yes; I am going to give a charge in substance without aiding and abetting.

Requests 5 and 6 in substance. I am going to give a charge on actual and constructive possession.

MR. FLANNERY: Your Honor, may I direct your attention to the aiding and abetting. It is not required to cite aiding and abetting in a substantive offense, and I think an aiding and abetting instruction would be appropriate.

THE COURT: We are dealing with Mr. Madonna. You did not ask for it. I had assumed that it was not in the case.

All right. Without aiding and baetting, those two will be given in substance.

Number 7 in substance.

Number 8 in substance.

Number 9 in substance, but I want to make clear that accessibility to possession is not part of the charge.

Number 10 in substance.

Number 11 in substance, except, again, I would point out to you that I am going to charge -- my charge is going to include both actual and constructive possession, and I am going to define those.

Number 12 in substance.

Number 13 is denied.

Number 14 and number 15 in substance, except that

on 15 the intent, the statute charges "distribute" and that is what we are going to utilize, rather than "sell".

Number 16, yes.

Number 17, yes.

Number 18, yes.

Number 19, yes.

Number 20 is denied.

On number 21, I am going to give the charge on how they are going to weigh the testimony. It is going to incorporate some of these things that you have indicated, but it is not going to incorporate all of them. Some of these things I may deal with on the issue of accomplices and so forth, something like that, but anyway, in substance I deal with this problem.

Number 22, the same way, but it is going to come out somewhat different from yours.

24 and 25 --

MR. LIPPEL: You skipped 23, your Honor.

THE COURT: I am sorry. Well, I am going to charge on accomplices, and I am going to indicate that they have to scrutinize the testimony with care. I am not going to say anything about perjury or anything like that, any other matter like that.

Numbers 24, 25 and 26 are denied.

Number 27, yes.

Number 28 is denied.

Number 29, in substance.

The supplemental charge that you have: I don't know. Is this a restatement of something else? You have 25 again.

MR. ALCH: It should not have been numbered 25, your Honor. It should have been 30.

THE COURT: Allright. We will call it 30.

The first three sentences will be covered in my charge on accomplices. The rest of it, the way you have it, I doubt. So the best thing to do is say in substance for the first three sentences and denied as to the rest.

The first sentence in 26 is denied. That is not the law. The rest is granted in substance.

The supplemental charge that I have in my hand, which is the last one you submitted today, about circumstantia evidence, is denied.

The one on the prior similar acts I am going to give an instruction on prior similar acts which will be just about what I gave when it came in, consistent with one of those requests I got from you.

MR. ALCH: Your Honor, may I ask --

MR. FLANNERY: Your Honor, I don't understand.

Which similar acts?

THE COURT: This is not numbered. Requested instruction in the event of admission of evidence of prior similar act, and I know what my instructions are going to be on prior similar acts.

MR. ALCH: Your Honor, may I ask a question?

Can you give me any idea with regard to your instruction to the jury on circumstantial evidence?

MR. FLANNERY: Excuse me. I am sorry, your Honor. I didn't understand what you are going to do about the prior similar act.

THE COURT: I said I have given an instruction on that, and what I am going to do is repeat what I have already told them. I have told them how they should view prior similar acts, and I am going to repeat that, and so all of you will know what my instructions about prior similar acts are going to be.

This is in part consistent with that, so it will be in substance.

MR. ALCH: Your Honor, about the circumstantial evidence charge, can you give us any idea of what you are going to say?

THE COURT: I am going to define circumstantial and direct evidence and say that for their purposes it

doesn't make any difference whether the evidence is circumstantial or direct. It depends upon the significance of the evidence as far as they are concerned. I make no distinction between the two.

Now, on Larca --

MR. BROWN: They are almost all the same, Judge.

THE COURT: They diverge at one point, though, don't they?

MR. BROWN: Yes, sir. Number 30 --

THE COURT: As to 29, the answer is the same, really, what I have told him.

On 30, in substance, part of my charge about a conflict is going to be what you are asking for, but the last half of that first paragraph, no, I doubt if I am going to give that.

The second paragraph: I am going to tell them that they have to view the testimony with care. I suppose, in substance, the answer is yes, but it is going to be considerably different from what you suggest.

Request Number 31 is denied, although again, the latter part of 31 is going to be in part my instructions on what a reasonable doubt is, a reasonable doubt arising from the evidence or lack of evidence, but the first part, no.

Number 32 in substance, and number 33 in substance

MR. FLANNERY: You said 33 in substance. That is the prior similar act.

THE COURT: Right. Again, on 33, I told you, you know what my charge is going to be.

MR.BROWN: Yes. For the record, I understand. I take an exception.

MR. FLANNERY: I am sorry, your Honor, but I have forgotten the charge. I know you said when it was being introduced you said that they were going to have to find from the evidence in the case --

THE COURT: They are going to have to find that the persons committed the acts charged in the indictment before they can consider the similar act.

MR. FLANNERY: You mean, they have to find the crime? It doesn't seem that the prior similar act is in any way useful.

THE COURT: They can't use the prior similar act to make up their mind as to whether or not they are guilty of what they are charged with. They can only use the prior similar act if they find they have committed the crime. If they have found that they committed the act, they can use the prior similar act.

We have not gotten to intent.

MR. FLANNERY: When discussing what people have done, then, for example, Madonna, who was sitting in the car at a certain time and place and one of the questions will be intent in addition to the circumstantial evidence, we have already discussed that at that time it is permissible to say that to know what his intent was, whether he was just sitting there or going some place else, ladies and gentlemen, you can consider the prior similar act with Visceglie solely for his intent at that time but for no other purpose?

THE COURT: I think what you ought to do is summarize and indicate to them that -- you can say he did the act before. I am not required to instruct them, to charge them on the law on that.

MR. FLANNERY: I am not asking you to instruct them but trying to get guidance as to how I can argue. I do not want to argue it in a way that is not permissible. I want to be able to make it clear as to how it applies.

THE COURT: My instructions to them about prior similar act don't appear to me -- you can ask them to consider that he did it before, that there is testimony that he had done it before and so on.

MR. FLANNERY: He did it before with Visceglie.

THE COURT: I think you can do that, but you are

not required to give the jury instructions on the law. You are telling them about the facts.

MR. BROWN: Are we supposed to do the same thing?

THE COURT: Yes.

MR. BROWN: This request, number 34. I don't think you mentioned that.

THE COURT: That is going to be specifically in my charge.

Now, too, the Larca requests.

The first two are granted in substance. Number 3, no, denied.

MR. ALCH: Your Honor, it bothers me, Mr. Flannery saying to the jury that he did it before; it is not really on all fours, even if you believe both versions.

THE COURT: He can argue to the jury, and he can tell the jury that they can take into consideration whatever is in evidence, so long as he doesn't get into any instructions. The purpose of summation is to comment on the evidence.

MR. LIPPEL: I am not certain whether the rules require that I take an exception.

THE COURT: Yes. You had better do that. I will just give all of you exceptions to every charge I didn't give you.

MR. LIPPEL: Thank you.

MR. BROWN: Don't we get a blanket exception?

THE COURT: Yes.

MR. ALCH: Exception.

THE COURT: All right.

Request Number 1 for the Government, in substance.

MR. BROWN: Your Honor, I didn't get the charges from the Government.

MR. ALCH: Neither did I.

MR. BROWN: We have never seen them.

MR. FLANNERY: I will have to get copies for them, your Honor.

MR. BROWN: Judge, why don't we do this in the morning? We haven't seen them.

THE COURT: All right. We will do it in the morning, at 9:45.

(Adjourned to November 12, 1976, at 9:45 a.m.)

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UNITED STATES OF AMERICA

- v s - 76 Cr. 846

MATTHEW MADONNA, et al.

November 12, 1976

[10:10 a.m.]

— — —

[Trial resumed; in the robing room.]

THE COURT: Let me continue with where we left off last night, which was going over the Government's requests.

Request No. 1, in substance, and No. 2, in substance. 3, in substance, 4, in substance, 5, in substance. 6, in substance. 7, 8, 9, 10, 11, 12.

MR. BROWN: As to 13, some terms used by the agents, they don't need any definition.

THE COURT: I am going to explain that actually part was in the car and that was a controlled delivery, that it was the Government's intent that these people would think they were getting seven pounds. I'm not going into that.

14 and 15, prior similar act --

MR. BROWN: You are not going to use examples?

THE COURT: No. Prior similar acts is denied. I'm going to use my charge.

We have gone into 18. 19, in substance.

Let's be clear about 20. I told you when I say in substance that means that I have verbiage in the chart that is going to cover it. It is supposed to be my own language both in respect to what I have told --

MR. BROWN: I didn't understand that.

THE COURT: I don't accept the language by either the Government or the defense if I have one of my own.

MR. LIPPEL: On 20, is that granted in substance?

THE COURT: Yes, 20, 21 and 22, in substance.

There is no testimony by any handwriting experts; is that correct?

MR. FLANNERY: No, there isn't. There is a stipulation on it about the writing.

THE COURT: That is the handwriting of Madonna?

MR. FLANNERY: Yes.

THE COURT: All right.

24 in substance. 25. 26 is denied, and that is it.

There are two pending matters. One is something I don't want to leave up in the air. My response to Mr.Flannery may have left the matter more ambiguous than it ought to be and I don't know that what I'm about to say is going to clarify it, but it appears to me that

any comment by any counsel on the evidence indicating to the jury that the evidence in their judgment means this, that and the other is fine, even insofar as the prior similar acts is concerned, except that I am going to have difficulty hear to start telling the jury what they can do with the evidence, that they can construe it this way, that way and the other. I think you have to skirt that line yourself because I just don't know how I can help out and give you any instruction that is going to keep it not subject to objection.

I think if you start telling the jury, Mr. Flannery, that they can view the prior similar acts and make this and that determination, I think that that is instructing them on the law. I think you ought to tell them about the facts, that it is a prior similar act, and if you want to use it, and that these people were in this business, doing this business. I just can't help you out. I just have to wait until it comes out.

There are two other matters. One is that I am going to have to go out in open court -- I think I'm required to do this in open court -- and make my announcement as to my own findings in regard to the status of the proof on the question of conspiracy and membership in the conspiracy.

MR. BROWN: You would say there is a conspiracy?

THE COURT: This is out of the presence of the jury. I have to make that finding out of the presence of the jury. I'm not going to tell the jury that I have made that finding one way or the other. I think it should be on the record.

MR. BROWN: Do we have to do it in open court, Judge?

THE COURT: I think you have to do it in open court. I think it has to be done in the presence of the defendants.

MR. BROWN: They should be present, but can't we do it in the robing room? Because if in any way if that filters to the jury -- God knows how those things filter in, but they do in the courthouse.

MR. LIPPEL: I would waive the presence of my client for purposes of that.

MR. BROWN: The press is there. They have the right to be there. If they print that and the jury sees it over the weekend we have had it.

MR. FLANNERY: I think it may be pro forma.

MR. BROWN: It may be to us, but not to the public, my relatives and friends.

MR. FLANNERY: I don't care.

THE COURT: It is pro forma.

MR. BROWN: It is devastating if any newspaper picks it up. They don't know what it means.

THE COURT: All right.

MR. BROWN: I would waive the right to have it in open court and request your Honor to do it in camera.

MR. ALCH: I agree.

THE COURT: All right. If all the defendants waive it being in open court, then I guess what we will have to do is do it here in the robing room. I don't want any problem on it. Get the defendants in here and I will take care of that problem.

MR. BROWN: What problem? What problem is that?

THE COURT: I didn't mean any problem in that way.

MR. BROWN: I wanted to know so I could see what it was.

THE COURT: I think an announcement such as this should be made in the presence of the defendants.

MR. BROWN: Yes, they will be told.

THE COURT: You don't want the defendants in?

MR. BROWN: Yes, sir.

THE COURT: Then let's have them in.

Let's get to the final point about the methadone treatment. Did you get those people here, Mr. Flannery?

MR. FLANNERY: I wish I had the agent here. They called at the conclusion of our meeting yesterday and were unable to contact anybody from there. The information they gave me about how the records are maintained, although they can't obtain specific information, about how the methadone is dispensed, and so forth, led me to a position where I wouldn't want to stipulate to the letter which I don't understand as it applies to this case.

May I explain my problem?

THE COURT: You mean we can't get those people down here?

MR. BLOSSNER: I asked that they be contacted and I received a call in my home last night. I wasn't at home. My wife received a call that the program doesn't open up until nine o'clock, but a nurse from the program would be bringing down the papers and I had specifically requested the first two weeks in April and the last two weeks in May.

THE COURT: Someone is bringing them down here?

MR. BLOSSNER: That is the message I received.

THE COURT: All right, Mr. Flannery, get the

agent who is helping you on this and let's get this finished.

MR. FLANNERY: Sure.

THE COURT: You have to rest before the jury.

MR. LIPPEL: Yes. There is one other matter that just came up this morning.

You better wait.

[Pause.]

THE COURT: Can't we get in touch with those people?

Mr. Meale just called Mr. Alpert and he wasn't in. I got in touch with someone else from the Legal Department, a Mr. Hoffman, and he had been in touch with Mr. Alpert. I requested that the records that you wanted for March, April and May be gotten together and brought down here. He said he'd be in touch with Alpert and they would try and get it down here.

Yesterday on the phone with Mr. Alpert, he indicated that the records would reflect that in fact Joseph Boriello or any person there in the program would have been or not have been there. He said the maintenance program is set up where the nurses' notes is made up and the prescription is given out. There is no indication that an individual signed for himself.

THE COURT: But the point is that I thought I told Mr. Flannery to have somebody who can tell us that, come down here today and tell us that.

MR. MEALE: I attempted to call last night and wasn't able to get hold of them.

THE COURT: Why don't you call now and see if whoever is bringing those records down here is in a position to tell us what they mean.

MR. MEALE: All right.

MR. ALCH: They said they wanted to hear from the judge.

MR. MEALE: When I called, they wanted the judge to put on the record that these records were requested and they wanted a call from your clerk, but I have been speaking to him. He is aware of it and evidently he is complying.

THE COURT: See whether we can get them. I don't know how we can do it.

MR. BROWN: It is a rush.

THE COURT: See if you can get them here so that we can get this matter settled. Tell them to bring somebody down here right away who can explain those records to us.

All right, Mr. Lippel, you said you had a point.

MP 2

Mr. Flannery is saying is, well, you know in these places anybody can go in and go get it.

MR. FLANNERY: I don't know what the records show, your Honor. I have been told things about about it by the agents based on their conversations.

THE COURT: Well, I think what I am going to do then is, I will get the sheets. You can indicate what the record shows, and when these people come back, if they come down here in time, we can have a conference with them and try to get the situation clarified.

At the present time, we can put into the record the letter and the sheets, and the question is going to be as to how you are going to utilize them. That will depend on when these people arrive and what we find out.

Is that fair?

MR. BROWN: It is fair. If they go in, it is up to them to rebut it. I think the sensible thing to ask is, other than rumor, does he have anything to rebut?

THE COURT: The people can come in. By that time the jury is going to be weary, anyway.

You will have Mr. Meale. Maybe he will recognize them. But I have no idea when this person will arrive.

MR. BROWN: Judge, that will come in during summation. Evidence coming in during summation? That will be

MP 3

a real proolem.

THE COURT: The only thing we don't know is Mr. Flannery's concern is that they can't be interpreted the way you suggest. I understand from you or from somebody that they don't have the records for April.

MR. BROWN: I think you have the things that show that.

THE COURT: No. I have May and June. I asked for March and April.

MR. BLOSSNER: Judge, the sheets that you showed me yesterday indicated that the first group --

THE COURT: May and June; is that correct?

MR. BLOSSNER: I believe, the last two weeks of April and the first two weeks of June.

MR. BROWN: Can we look at it, Judge? I must admit I can't argue with it. Maybe someone could bring those in.

(Pause.)

THE COURT: All right. Let's get this other business straightened out about your rebuttal.

Any testimony that prior to the time he allegedly spoke to his mother and his brother and threatened them, that he had indicated that he had entered into an agreement with the Government and understood that agreement was to

MP 4

immunize his brother is admissible.

MR. BROWN: But Judge, he made the threat --

THE COURT: The mother said he made it to all of them. The brother said he made it to all of them. Ralph said he made it to all of them.

The point is that that testimony can come in.

MR. BROWN: Just the date?

THE COURT: No.

MR. BROWN: Judge, the very agreement is in.

MR. ALCH: How can we cross-examine on that?

THE COURT: You are arguing. You are indicating that at a certain time he made a statement to his mother and his brother that the reason for his testimony was because of that.

Now, the law is clear that if he had made statements that were inconsistent with that, that showed -- that would go against that interpretation prior to the time that he is alleged to have done the other business, it is admissible.

MR. BROWN: But not the whole grand jury testimony. All he wants is the date of the so-called agreement. Not the whole grand jury testimony.

THE COURT: No. What he wants to introduce and what he can introduce is the statement that he made before the grand jury, stating, or indicating whatever it is that

his understanding was that that agreement is. That can either be read to the jury, or that can be put in evidence.

MR. BROWN: But, Judge, he already has the agreement in.

THE COURT: No; he doesn't. The agreement he has is an agreement with the date that I think post-dates the time of the conversation.

MR. BROWN: But he gives the time of his conversation with the Government. He's got a 30th date for the agreement, but it sets up the date that he also --

THE COURT: Well, in any event, the agreement, his interpretation before the grand jury, his understanding of what the agreement was indicates that by virtue of the agreement he understood that his brother was being held harmless; but anything he said can be brought to the attention of the jury.

MR. ALCH: Are we being deprived of the right of cross-examination, Judge?

THE COURT: What right of cross-examination?

MR. ALCH: To question exactly what Mr. Boriello had in his mind when he testified before the grand jury.

THE COURT: The point is that he testified here, and he has indicated the agreement -- we have the agreement. All I am doing at the present time is indicating his testimony

MP 6

is dated prior to the date -- I am dating his testimony prior to that before the grand jury.

Now, the Government has a right to make that argument.

MR. BROWN: Respectfully, we have an objection.

THE COURT: You see, my problem is that I can hardly read these things.

MR. BROWN: Can we look at it, Judge?

THE COURT: Maybe you can read it. I see here 06-18-38, and then some other dates.

MR. BROWN: June 18, 1938.

MR. FLANNERY: Can I see it, too?

THE COURT: Now, let's finish this. What are you proposing to adduce from the grand jury testimony?

MR. FLANNERY: I was going to offer any testimony that he gave in the grand jury about his brother in addition to the agreement, this agreement that we have just been discussing, any testimony about his brother in the grand jury.

THE COURT: What did he say?

MR. FLANNERY: He said his brother went to the luncheonette, things like that; his brother shared in the profits with him; he was partners with his brother and Larca.

MR. ALCH: You see, if your Honor please, there is

MP 7

also language regarding Madonna that is in conflict with Boriello's testimony before you, when he offered his plea. We are going to get into all kinds of trouble with this.

MR. BROWN: Judge, here is the page. This is the date of birth.

Now, in order to protect the record, they blotted out everything from all the patients except 15, 19, 20. These are the dates he was treated.

MR. BLOSSNER: Patient visit report for the month of April 1976, dates of visits. Now, we have only asked for the last two weeks of April, so they blocked out the first two weeks, but it shows he visited the 15th, 16th, 19th, 20th, 21st, 22nd, 23rd, 26th.

MR. BROWN: Now, the same thing for me. So it showed that he made those visits.

THE COURT: Let me see the letter. That's right. He left on the 12th.

MR. BLOSSNER: It indicates he was going to leave on the 12th. He picked up the passport. It was issued on the 12th.

MR. BROWN: That's what we saw yesterday.

THE COURT: It seems clear.

MR. ALCH: Judge, in view of Mr. Flannery's purpose in reading the grand jury testimony, he is not going to

be allowed to read anything about my client, is he?

THE COURT: No; he isn't.

MR. BROWN: Judge, can't we put in the dates from the letter?

THE COURT: I have no problem with that. I'm sorry; I couldn't read it. This is April. I was looking at the month of May.

MR. BROWN: That's May.

THE COURT: Well, I see that.

MR. BROWN: All they blotted out was to protect everybody else and all the other dates.

THE COURT: This seems to be in order. Even though we don't have anybody testifying about it, they certainly seem to be in order. I don't see any reason why they can't be used for the same purpose.

MR. BROWN: It's here.

THE COURT: I am sorry. I could have saved myself a lot of time if I had read carefully.

MR. BROWN: That is what I was trying to tell you earlier this morning. We had a chance to look at it just briefly.

MR. FLANNERY: Your Honor, I would want to have the records for March and April for my own purposes.

THE COURT: All right. But that can be put in.

MP 9

There is no reason why it can't.

MR. BROWN: We can't offer it, but the blotting out indicates April --

THE COURT: I thought you told me the blotting out was otner patients' names, and what was left was his name.

MR. BROWN: But for April they blotted out the first half.

MR. BLOSSNER: For the first half of April, they blotted this out.

MR. BROWN: They only gave us what we specifically asked for.

THE COURT: All right. I think that's right. We will just wait. If they come and they have some other records, we will put those in evidence, too. How is that?

MR. BROWN: But I don't know how they will pertain, Judge, because if he were there in March --

THE COURT: But the point is, if they come in, they may or may not show that. I don't want to wait until these people come down. We have these records.

MR. BROWN: But they are ready to go in.

THE COURT: If the other recores show they are pertinent, we can put them in as well. If they are not, they don't go in.

MR BROWN: All right. We can put these in.

MP 10

THE COURT: Where do we stand now? Is there still some problem?

MR. FLANNERY: The grand jury testimony: what the Government will be able to read.

THE COURT: Well, there is no statement about Madonna or Larca. The only statement --

MR. LIPPEL: Or Klinger.

THE COURT: The only parts that can go in are statements which show that he knew that he had entered into an agreement prior to this so-called conversation with his mother, when she indicated that he was threatening her, that he had already made an agreement with the Government that was going to save his brother from being prosecuted. The Government is entitled to put that in.

I don't know how you are going to handle it, but there can't be any reference in there to Larca, Madonna or Klinger.

MR. FLANNERY: What about any reference to his brother's involvement other than Larca, Madonna and Klinger?

THE COURT: That can go in.

MR. BROWN: What was that?

MR. FLANNERY: I will have to look and see if it can be done.

MR. BROWN: I don't understand that.

THE COURT: Mr. Brown, as he has indicated on the witness stand before, he testified about his brother's involvement, and even while he was testifying about it, before he is supposed to have had this argument with his mother and he said, "I'll send you up, any of you up to save myself and Leslie," at that time he understood that the Government would not move against his brother.

MR. BROWN: He just said something I didn't understand.

THE COURT: He will redact if it can be done. My suggestion is maybe the best way to do it is to read that portion of it.

MR. BROWN: Why not just specify -- he said he would settle for just the date. That is all that is pertinent on this.

MR. FLANNERY: I don't believe I ever said that.

MR. BROWN: Well, I misunderstood you, but I thought you did.

THE COURT: He has a right to put that in. You may take your exceptions. I think all of you do. But there is no basis upon which Mr. Flannery can get in there anything in his testimony about Madonna.

MR. FLANNERY: Do you want to bring the defendants in?

THE COURT: Yes. Then we can go back in the courtroom and bring in the jury, and you can rest, Mr. Lippel.

You can put this in, and you can put the grand jury testimony in, such parts as we have decided should go in.

MR. LIPPEL: Judge, when can we place our final motions on the record?

MR. BROWN: After he has redacted that grand jury testimony.

MR. LIPPEL: Then we can come back here?

THE COURT: Yes. I think you understand how I am going to rule on your motions, but you can put them on the record.

MR. LIPPEL: I understand that.

THE COURT: One thing more while I have you here, to allow you to make your objections. If I have the time, what I generally do is to make copies of my charge, have it xeroxed, and copies are passed out to the jury.

MR. BROWN: Oh, I never --

THE COURT: They can follow it while I am reading it. They do not take it into the jury room. I do that, because I have found that they understand it better by reading as I deliver it.

MR. BROWN: Can you give us a copy today?

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THE COURT: No. I will give you copies when they are xeroxed, which will be Monday morning. I am just telling you that now, so you can make whatever objections you want, to protect yourselves.

MR. BROWN: I wouldn't object to that, but I have never heard of it before.

THE COURT: Some of the judges allow them to take copies of the charge into the jury room.

MR. BROWN: I object to that on the ground that that, in conjunction with the minutes, deprives counsel and the Court of the reflections of the jury.

THE COURT: You mean in taking notes?

MR. ALCH: Note my objection, also.

MR. BROWN: Do they take their notes into the jury room?

THE COURT: Of course. That is the reason for making the notes.

MR. FLANNERY: Do you intend to send in the indictment?

THE COURT: Well, of course. Generally they want a copy of the indictment.

(Defendants Madonna, Larca and Klinger entered the robing room.)

THE COURT: Gentlemen, I am required to make various

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findings on the status of the Government case in respect to conspiracy, and your counsel had requested that this be done in the robing room rather than outside, in terms of the possibility of newspaper coverage, and I understand you are waiving your right to have it done in open court, but I want a specific waiver of that right by each of you, individually, on the record.

MR. BLOSSNER: If your Honor please, at this time Mr. Madonna wishes to waive the right to have the following proceeding in open court.

THE COURT: Is that correct, Mr. Madonna?

DEFENDANT MADONNA: That is correct, your Honor.

MR. BROWN: Mr. Larca will speak for himself.

DEFENDANT LARCA: I waive the right to have this proceeding in open court.

MR. LIPPEL: I have conferred with Mr. Klinger, and he also waives his right to have this proceeding in open court.

THE COURT: All right. I have to make a finding whether or not the Government has established, one, a conspiracy, in Count 1, and, two, whether it has established that one or more of you or each of you is a member of the conspiracy, apart from hearsay evidence, and I begin, of course, with Mr. Klinger.

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I find that the Government has established it throug the testimony of Mr. Borkello and the testimony of Miss Portman. It is clear that that has been so established.

I want to make it clear when I say it is clear I mean that the Government has established a prima facie case, and I am only using the Government's evidence, not any evidence from the defense.

DEFENDANT KLINGER: Am I allowed to say anything?

THE COURT: No; you are not. You are here only because we are not in open court, for the reason I indicated to you, and you must act just as you do in court: keep quiet.

MR. KLINGER: Yes, sir. I am sorry.

THE COURT: Insofar as Mr. Larca is concerned, the evidence is also clear that that it has been established by the testimony of Mr. Boriello that Larca and Boriello planned it, that he got the suitcases and so forth.

As far as Mr. Madonna is concerned, the evidence thus far is circumstantial, but I think there is sufficient for the Government to have established a prima facie case.

The circumstantial evidence, as I see it, is, one, renting of the car in a name not his own, the red Grenada, that Grenada being utilized by Mr. Boriello for the supposed transport of the heroin; your taking possession of the car at 58th Street and Fifth Avenue and your rental of the car at

a time when the evidence shows that you had also rented another car and therefore had the use of the car for your purposes, and your presence at Mr. Larca's home at the time when Mr. Boriello made his visit on his return from the trip.

Under those circumstances, it is my finding that a prima facie case has been established.

All right. We can go back into the courtroom and continue the proceedings.

MR. LIPPEL: Judge, if you will allow me two minutes for a personal matter, I would appreciate it.

THE COURT: All right.

(In open court.)

THE COURT: Mr. Flannery, please remove the chart. When you begin your argument, you may use it.

MR. FLANNERY: Yes, your Honor.

(Jury in box.)

THE COURT: All right, Mr. Lippel.

MR. LIPPEL: If your Honor please, the defendant Richard Klinger rests.

MR. BROWN: If your Honor please, at the time I rested on behalf of Larca I had requested your Honor's permission to re-open if certain records became available. They have now become available, and they are records that have been kept in the ordinary course of business. May I offer

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them, please, on behalf of Mr. Larca?

THE COURT: Yes.

xxx (Defendant Larca Exhibit V was received in evidence.

THE COURT: Anything further?

MR. BROWN: No, your Honor. Defendant Larca rests at this time.

THE COURT: All right. Any rebuttal, Mr. Flannery?

MR. FLANNERY: Yes, your Honor.

The Government would offer its portion of the grand jury testimony of Joseph Boriello dated September 24, 1976.

MR. BROWN: May we see it in terms of redcation, your Honor?

MR. FLANNERY: Your Honor, perhaps it would be best if I showed it to the Court. I have indicated by a black line starting at page 4 that portion that I would read.

THE COURT: Does that black line indicate the portion that should be admitted?

MR. FLANNERY: That is the portion that I would read. I think it starts at page 4, your Honor.

THE COURT: I see.

(Pause.)

THE COURT: All right. So far, pages 4 and 5, just those pages?

MR. FLANNERY: I think that's right. May I look

at it again?

That's correct, your Honor.

THE COURT: All right. Show them to Mr. Brown.

MR. BROWN: Judge, does this end on page 4?

THE COURT: No; he will read what is marked on pages 4 and 5, what he has marked on those pages.

MR. BROWN: That ends at page 5, line 11; is that correct?

THE COURT: Yes.

MR. FLANNERY: May I read it, your Honor?

THE COURT: Yes.

MR. FLANNERY: Grand jury testimony of Joseph Boriello, dated September 24, 1976, 2:40 p.m.

"Q (By Mr. Flannery) At that time you had agreed to cooperate with the Government?

"A Correct.

"Q You presently have an understanding with respect to your cooperation with the Government; is that correct?

"A Yes.

"Q Is it your understanding that you will plead to the present indictment in this district charging you and others with violating the narcotics laws?

"A Yes.

"Q And that is a two-count indictment?

He got on that stand. He told you about a $10,000 loan. He said he went to Matthew Madonna in December at a restaurant and he said to him at that restaurant, "I need some money."

And for what?

"It's for a drug deal.

"I don't want to have anything to do with it. I'll lend you the money. Just give me my money back."

That was the loan. Why didn't he make that a narcotics deal? It didn't happen that way. It was just a loan. When did he pay him back? He paid him back at a specific time for a specific reason when that drug deal failed in February of 1972 and the narcotics were not delivered, then he was concerned about Mattie Madonna's money and he wanted to get in his good graces and would do anything he could to appease him, so he immediately got $10,000 and paid him. That tells something about his scheme of values, who he was concerned about. Then he took off for Miami. Why didn't he change the facts? It didn't happen. You may recall that Matthew Madonna met him in a car wash a ye later. Madonna came up without Nick Visceglie saying anything to him and Matthew Madonna said, "I'm not in that business any more."

You can wonder why he would say that. He

doesn't want Nick Visceglie saying he is in the junk business or whatever reason.

MR. ALCH: I am going to have to object. The testimony was "I am not in that business." That was directly out of the Grand Jury minutes.

THE COURT: All right.

MR. FLANNERY: It is the jury's recollection.

Perhaps some of the witnesses would have had their times exactly the same, the places exactly the same, and all their rememberances exactly the same but as you go through the record in this case you'll find that there are very few people who have exact times, two agents in the same car who are noting times for reports, and so forth, and then there are several witnesses who know times exactly. The Battistas know times exactly.

You can rely on the testimony in a criminal trial of the accomplices alone. In this case you have accomplices who supported each other and, in addition, you have documentary support for what they do say. Ask yourselves, why would they come here to lie about these defendants, why pick these defendants out? Let's consider the personalities you have heard about or seen.

Sal Larca has been Ralph Battista's close friend since he was about twelve years old. Sal lent

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A F T E R N O O N S E S S I O N

[2:45 p.m.]

[In the robing room:]

THE COURT: These gentlemen have arrived and I wish them to introduce themselves.

MR. CAFARELLI: J. L. Cafarelli, Albert Einstein College of Medicine.

MR. MARION: Ira Marion, the same.

MR. KAUFMAN: Jack Kaufman, the same.

THE COURT: What Mr. Meale has told me, and I want him to put it on the record, indicates to me that this document is not reliable for the purposes that you want to use it. I want him to repeat and tell us precisely what he told me. I want it on the record.

MR. MARION: Essentially this document --

THE COURT: Referring to Larca Exhibit B.

MR. MARION: -- Larca Exhibit B, essentially what this is is a recap of dates of clinic visits that were recorded for the purposes of billing. Essentially these are in no way reliable dates and are used essentially for billing possibly third party payers such as Medicaid, and the recording of these dates seems to be arbitrary.

THE COURT: Why is that specifically with regard to this particular program?

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2 mcsr

MR. MARION: Mr. Boriello came to this program upon terminating his employment from the therapeutic community known as LOGOS which espouses a drug free philosophy, almost diametrically opposed in many cases to methadone maintenance and what methadone maintenance is in terms of treatment. The program he came from was LOGOS.

Essentially, we, rather than send him to a clinic where he would have to interact with people that he had done business with as director of the therapeutic community -- one of our staff is the brother of somebody who worked with him in the therapeutic community -- we kept him in a small unit in our central office known as the pharmacy, essentially where most of the medication is prepared and where people, most of whom are staff members, also in treatment, are medicated.

This pharmacy is not a clinic and does not keep accurate records as such, and therefore does not have definitive clinic visit records. These recaps would come from dates that were just circled arbitrarily during that period of time.

THE COURT: So that the dates that are on those sheets indicating April and so forth, which appear to show that, at least as I read them and as defense counsel read

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them, would appear to indicate that Mr. Boriello was at the clinic on April 15, 16, 19 and so forth; and are you saying that that does not establish that he was in fact not there?

MR. MARION: It does not establish that.

THE COURT: What records would establish that?

MR. MARION: Had he been in a regular clinical unit and he been picking up medicine as most of our patients do, there would be a set of nurses' notes which would log the day and the time that he would have picked up medicine, would have been signed by a nurse and it would have comments listed.

THE COURT: One final question: There is a letter there which indicates that he has progressed very well in the program and therefore it is safe for him to go abroad. What does all that mean? That is dated May 6, I think.

MR.MARION: The Federal regulations do not allow us to dispense more than three bottles of methadone without acquiring prior approval from the Government. This is a letter requesting such approval, so that we could dispense more than three days' supply of methadone to Mr. Boriello.

THE COURT: Mr. Brown.

MR. BROWN: Doesn't that indicate that he was present at the time you made such a request in this country?

THE COURT: That letter is dated May 6th.

MR. BROWN: Doesn't that indicate that his request would have been made at or about that time and that he was in this country to make the request? Isn't that letter reliable to that degree?

MR. MARION: I think you could assume that.

MR. BROWN: That is a fair assumption. So, therefore, Judge, I think we could at least have that.

With respect to the other --

THE COURT: His testimony was that he was --

MR. BROWN: He was away that week.

MR. FLANNERY: He was away in April.

MR. BROWN: April and May.

MR. FLANNERY: No.

MR. BROWN: Let me get the record.

MR. FLANNERY: Sorry to disturb him.

[Pause.]

MR. BROWN: There are four times in the record when he says the following: "End of April, first week in May."

MR. FLANNERY: That is not the entire statement.

When he arrives back and when he is --

MR. BROWN: "At this point in May when you returned, how many times had you been abroad previously?

"A End of April, first week in May."

MR. FLANNERY: That is not contradicting testimony.

THE COURT: That was May 6th.

MR. BROWN: He would have to be here to get the letter.

MR. MARION: This letter isn't given to him.

MR. BROWN: No, the letter does establish dates.

"Towards the end of April I borrowed money from Larca. I lost my job, was in debt. Then I took a trip around the world."

112: "First week in May, 1976."

THE COURT: That he was away?

MR. BROWN: Yes, sir.

"What time did you arrive back and speak to your brother?

"First week in May."

MR. FLANNERY: That is not contradictory.

THE COURT: May 6th.

MR. FLANNERY: First week in May.

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MR. BROWN: First week in May. He says also that he was away the first week in May and the last week in April. That is exactly what he said.

THE COURT: According to this testimony, Mr. Brown, I'm not going to allow anything to be said on that.

MR. ALCH: May I ask a couple of questions?

THE COURT: Surely.

MR. BROWN: May I call your attention to one other thing thatis consistent? The reasons that he gives there are a trip to Italy, which is precisely inconsistent with what he has testified to and which deals with the fact that he had told his mother and brother that he was going to Italy. I say it is important for that purpose as well.

MR. FLANNERY: We have his passport, your Honor.

THE COURT: All right.

MR. ALCH: Sir, doyou know who made those records?

MR. MARION: I know who wrote that letter.

MR. ALCH: I'm talking about the records. Do you know who made those records?

MR. MARION: You mean the dates?

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MR. ALCH: The ones that you said were not reliable.

MR. MARION: That is a computer.

MR. ALCH: Who feeds the computer?

MR. MARION: It is picked up off of a -- it is picked up off a computer sheet that had dates circled on it.

MR. ALCH: Where does computer get the information in which to run these dates?

MR. MARION: From the circled numbers.

MR. ALCH: Who circles the numbers?

MR. MARION: It could have been someone in the pharmacy.

MR. ALCH: So you didn't?

MR. MARION: No, I did not.

MR. ALCH: Would you agree that the person who did would be in the best position to tell us just what those circles mean or what they don't mean?

MR. MARION: I think they can tell you what they mean and what they don't mean.

MR. ALCH: Even though you didn't make them?

MR. MARION: Right.

MR. BROWN: Do you mean to tell me you deliberately keep records that are inaccurate, possibly

false, for the purpose of billing the State of New York for something?

MR.MARION: Your Honor --

MR. FLANNERY: That is not so.

THE COURT: The point now is that that is one of the reasons that we had some problems about this. I understand from these people, and I am not going to have this developed in this kind of thing, as far as what I understand from what Mr. Marion indicated, this is a special program, evidently, because it was kept confidential for certain people by virtue of what they regard as being their sensitive positions. They did not keep reliable records the way they do in their regular program, which is an explanation and apparently embarrassment for this particular one who has indicated that either program they would be able to verify and they would be able to know.

MR. BROWN: I ask that we put them in and let them testify against them. They are records kept in the ordinary course of business and they have a right --

THE COURT: No, I'm not going to have this business developed as to whether or not this program was kept and is involved in anything with the Government. I'm not going to do that.

MR. BROWN: You didn't hear me, Judge. The fact is that it appears that Mr. Boriello violated the trust that they placed in a special program, which is there for the benefit --

THE COURT: That hasn't been established.

MR. BROWN: That is what the gentleman said. It was there for that special purpose and we contend that he has violated it.

THE COURT: That is a supposition that I'm not going to get involved in. All I know is that Mr. Marion has indicated that these records aren't reliable; that somebody circled those things, apparently his program, for the purpose of billing only, and he can't rely on the facts that this man was here.

MR. ALCH: He has no knowledge of it. He has not got a sufficient basis to interpret them.

THE COURT: I put it on the record so that you could do what you want to. The records to me aren't reliable and they aren't going to be used.

MR. BROWN: May I ask that the person who kept the record be brought in and state -- that is, that the, if you will, amaneuensis be brought in to establish the reliability of the records.

THE COURT: I' m not going to delay the

trial. This is a matter that is not directly involved in this trial. You have other issues, it seems to me, that go to the credibility of this man. I'm not holding up this trial for that.

As far as my ruling on the matter is concerned, it is that the records are not reliable. It is on here. If I made an error, then, of course, if necessary, you know what to do with it.

MR. BROWN: Will your Honor mark it a Court exhibit and seal it?

THE COURT: We are not sealing it.

MR. BROWN: We have got to have something to show what -- I don't mean seal. I mean seal it for appeal; mark it as a Court exhibit and seal it for appeal.

THE COURT: All right, then, okay.

MR. BROWN: We respectfully ask you to do that.

THE COURT: Yes, I will do that, Mr. Brown. We are going to seal these references.

MR. BROWN: And all references have been with respect to Exhibit V.

THE COURT: Yes, this relates to a discussion of Exhibit V, which will be sealed for Court purposes.

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He was picked up by Agent White, who followed him to Larca's house.

Now, Mr. Brown, during the course of his summation, sort of fudged over one thing and said they agreed about the time, didn't they? They agreed, that is, Ralph Battista and White and Boriello all agreed about the time. They merely differed on who met whom at that time. Both Agent White and Joe Boriello saw a meeting and/or participated in a meeting with Sal Larca. Only Ralph Battista claims he went around to meet his brother at that time.

Then, at approximately two-thirty, Sal Larca is seen to leave his home. Oh, certainly, he could go anywhere in the world if that were the only isolated fact that you had, that at two-thirty he was leaving his home. But you have more than that. You have circumstances, and the Judge will instruct you on circumstantial evidence.

You are not just considering a person leaving his home at two-thirty. You are considering the fact that a man has come in from Bangkok, awaiting a heroin shipment. At two-thirty, after he met him at Larca's home, he leaves the home, two-thirty. And where did he go? He went to meet Matthew Madonna, who had driven the car which had been five blocks from his home to a position on Bronx Park East, where he left the car.

MR. ALCH: Objection. There is not one single iota of proof of that.

MR. FLANNERY: That's not true, your Honor.

THE COURT: All right. The jury will recall the testimony, and it appears to me, from the things that have been brought up, that this is a fair comment on the evidence. That is all I can say.

All right. Proceed.

MR. FLANNERY: Thank you, your Honor.

Sal Larca drove to Bronx Park East, and what did he do there? He picked up Matthew Madonna, and he brought him back to his home, and at three o'clock he wasn't standing at the gate, as Ralph Battista said, or as that man's brother, Benjamin Larca said. Oh, no. He was in there, seeing for the first time, according to the testimony in this case, Joe Boriello. And was he afraid when he saw Joseph Boriello, the man who had managed to get two suitcases into this country with what he believed to be seven pounds of heroin? Joseph Boriello, who had previously brought that kilo of heroin without any problem? Joseph Boriello, whom Sal Larca, Matthew Madonna's partner, trusted? Did he have anything to fear from a man his partner trusted? No, sir. He had no reason.

And what did he do? He just said, "Hello," and

UNITED STATES OF AMERICA

vs. 76 Crim. 846

MATTHEW MADONNA, et al.

New York, New York
November 15, 1976 - 10 a.m.

- - -

(In the absence of the jury.)

MR. ALCH: Just briefly, if the Court please.

Your Honor, may I hand up, so that it may be made part of the trial, an article which appeared in the last night's Daily News dated Monday, November 15th, and I would respectfully ask your Honor in a general way, to inquire of the jury whether or not they have read anything.

THE COURT: All right.

MR. ALCH: Thank you.

THE COURT: Bring in the jury.

(Jury present.)

THE COURT: Ladies and gentlemen, have any of you heard any articles or read anything about this case over the weekend?

THE JURORS: No.

THE CLERK: The Court is about to charge the jury. Anyone desiring to leave the courtroom will do so now or remain seated until the completion of the Court's charge.

Marshal, please close the door.

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CHARGE OF THE COURT

THE COURT: Now, I am going to pass out to you a copy of my charge for each of you, so that you will be able to read it and listen to it as I read it. You cannot take that into the jury room with you. You will have to return it when it is over, but I have found that the jury is able to absorb the charge better by this method.

So, remember, you read it and listen to it while I read it to you.

It is not as long as it seems.

There are a few sentences on separate pages. So don't be alarmed.

Ladies and Gentlemen:

We now come to that part of the case where the evidence is in, the lawyers have presented their arguments and you are about to exercise your final role which is to pass upon and decide the fact issues that are in the case. You are the sole and exclusive judge of the facts. You pass upon the weight of the evidence. You determine the credibility of witnesses. You resolve such conflicts as there may be in the evidence and you draw such reasonable inferences as may be warranted by the testimony or exhibits in the case.

My function at this point is to instruct you as to the law that is applicable to the case. It is your duty

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to accept the law as I state it to you in these instructions, a. to apply it to the facts as you find them. The logical result of that application is the verdict in the case.

I have permitted each of you to take notes during the course of this trial. I expect you to use whatever notes you took merely as memory aids. They should not be allowed to take precedence over your independent memory of the facts. Moreover, merely because a fellow juror may have memorialized in his or her notes something contrary to your recollection, is not to be taken by you to mean that your memory is in error. It is your own recollection of the facts, and yours alone, which is controlling.

With respect to any fact matter, it is your recollection and yours alone that governs. Anything that counsel, either for the Government or the defense may have said with respect to matters in evidence during the trial, in a question, in colloquy with the Court, in argument, or in summation, is not to be substituted for your own recollection of the evidence.

So, too, anything the Court may have said during the trial, or may refer to during the course of these instructions, as to any factual matter in evidence, is not to be taken in lieu of your own recollection. The case must be decided by you upon the sworn testimony of the witnesses, and

such exhibits as were received in evidence and any stipulation entered into among counsel.

At times throughout this trial I have been called upon to make rulings upon various matters of law, as when a question put to a witness was objected to, or after a question was answered a motion was made to strike the answer or the offer of a document was objected to.

I have sustained some objections and I have overruled others. I have received and rejected exhibits that were offered. It is essential in the performance of your duty that when anything was ordered stricken from the record or rejected, you put it out of your mind and disregard it. Similarly, if a question was asked and an objection to that question was sustained and no answer was given, the question itself should play no part in your consideration of the case. Please do not concern yourselves at all with my reasons for any of these rulings. These are purely legal matters.

Conferences at the bench or sidebar were conducted at the request of the attorneys. As I have advised you, these conferences were solely on questions of law and are of no concern to you. You are not to draw any inferences against either side because of requests for such conferences or because such requests were denied.

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It is your function to determine the truth or falsity of the testimony of each witness. No inference as to the credibility of any witness should be drawn from the fact that upon occasion I have asked questions of a witness. My questions were only intended for clarification or to expedite matters. They were not intended to suggest any opinion as to the credibility of a witness who appeared before you.

Now how do you determine the truth and how do you appraise the credibility of the witness? Well, simply put, you use your own plain, every day common sense.

The degree of credit to be given a witness should be determined by his or her demeanor here, his or her relationship to the controversy and to the parties, his or her bias or impartiality, the reasonableness of his statements, the strength or weakness of his recollection viewed in light of all other testimony and the attendant circumstances in the case.

You observed the witnesses. You heard their testimony. How did they strike you? Did their answers seem frank, open, truthful, candid? Or were they equivocal, deliberately confusing or evasive? Or were they somewhere in between. How did each witness impress you? So you take each one, and on the basis of your common sense and your every day experience you determine whether or not you believe the witness

and to what extent you believe them.

In passing upon the credibility of a witness, you may also take into account whether there were material inconsistencies or contradictions within his or her own testimony; whether a witness changed his or her testimony; the extent to which he or she has been corroborated or contradicted by other credible evidence; his criminal record, if any; whether the witness is a disinterested one or one who is fostering some interest of his own in giving testimony.

An interested witness is not necessarily unworthy of belief. It is a factor, however, which you may consider in determining the weight and credibility to be given to that witness' testimony.

If you find that any witness has wilfully testified falsely to any material fact, you may disregard all his testimony or accept such part of it as you believe worthy of belief as it appeals to your reason or judgment.

A witness may be discredited by contradictory evidence, or by evidence that at other times the witness has made statements which are inconsistent with his or her testimony here. If you believe that any witness has been discredited in this manner, you may give the testimony of that witness whatever credibility, if any, you think it deserves.

Now, the testimony of a witness may fail to

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conform to the facts as they occurred because the witness is intentionally telling a falsehood, because a witness didn't accurately observe the events about which he testified, or because his recollection of what happened is at fault, or even because he has not expressed himself clearly in giving his testimony.

You are entitled to consider the possibility that when a witness is called upon to testify some time after the event, that inconsistencies may result from an innocent mistak or lapse of memory, rather than from a deliberate attempt to falsify or change the facts. It is not unusual for a witness in a proceeding to utter inconsistencies at some stage.

You may accept so much of the testimony of a witness as you may deem true and disregard the rest. You are at liberty, if you deem it appropriate, to disbelieve the testimony in whole or in part even though it is not otherwise contradicted or impeached.

The fact that the government is a party here -- that the prosecution is brought in the name of the United States of America -- entitles it to no greater consideration than that accorded to any other party to the litigation. By the same token, it is entitled to no less consideration. All parties, government and individuals alike, stand equal before this court of justice.

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Certain of the witnesses called in this case have been identified to you as expert witnesses. These have been James Luk, Gary Sorgen, and Dr. John Sawinski, who testified with regard to the analysis of heroin purportedly seized by the government. Each of these men is qualified to render expert opinions relative to his area of expertise.

The law permits such an expert witness to testify in the form of an opinion, and the opinions stated by these experts are based on particular facts as the expert himself has observed them or as the attorney who questioned him has asked him to assume.

However, the expert is subject to the same rules of credibility as any other witness. You may reject his opinion if you find the facts different than he assumed or if you find his testimony unconvincing, and you may accept or reject the testimony as you would the testimony of any other witness. The opinions of the experts must be considered by you but are not controlling in reaching a judgment. In short, you may give the expert testimony such weight as you feel it deserves. The determination in this case rests with you, not with the experts.

In deciding this case, you will be called upon to consider both direct evidence and circumstantial evidence. It is well to explain now the difference between these two types

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of evidence.

Direct evidence is where a witness or a participant testified to what he saw, heard or observed, what he knows of his own knowledge, something which comes to him by virtue of his senses. A document can also contain direct evidence.

Circumstantial evidence is evidence of facts and circumstances from which one may infer connected facts which reasonably flow in the common experience of mankind. Stated somewhat differently, circumstantial evidence is evidence of facts from which other facts that are material in the lawsuit may be found by a process of inference.

Let me give you an example that I believe has nothing to do with the facts in this case.

Suppose you had a material issue in some case as to whether John Doe was drinking alcholic beverages on some particular night. A witness might take the stand and testify that he had given whiskey to John Doe and had seen him drinking it. That would be so-called direct evidence. If you believed the witness and thought he was able to record accurat you could find from that direct evidence that John Doe had been drinking on the night in question.

You might have a witness testify that he had seen John Doe enter a tavern and then had seen him leave the tavern

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a few hours later, walking and talking in ways that frankly suggested he was drunk. If you believed that witness and thought he was an accurate reporter, you could find on the basis of that testimony that John Doe had been drinking on the night in question and that would be circumstantial evidence of that material fact in that hypothetical case.

Let me tell you for your purposes that there is no general rule of law and no general rule of good sense that places either of these two types of evidence, direct or circumstantial, in a general way on any higher or lower or different footing from the other. With respect to any evidence admitted into a trial record, whether it is direct or circumstantial, it is entitled to such weight and you are permitted to draw such reasonable inferences as your good judgment dictates in a particular case.

The weight and effect of any item or category of evidence depend not on whether it is to be categorized as direct or circumstantial, but on the concrete significance of that particular piece of evidence in its trial setting and upon its intrinsic credibility and persuasive power in the light of your observations of the witness, your own general experience of things and your reasonable analysis of the whole record.

There are times where different inferences may be

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drawn from facts, whether they are proved by direct or circumstantial evidence. The government asks you to draw one set of inferences, while the defendants ask you to draw another. It is for you to decide, and for you alone, what inferences you will draw.

Admissions of the defendant are among the most effectual proofs in the law, and constitute the strongest evidence against the party making it that can be given of the facts stated in the admission. Accordingly, you are entitled to give great weight to the defendants' admissions in this cas But, as with all the evidence, it is for you to determine what weight to give to the admissions.

The government has called as witnesses Joseph Boriello, Joseph Florio, Jan Portman and Eugene Travers who, if their testimony is to be accepted, were accomplices in the crimes charged against the defendants in this case. The government has also called Nicholas Visceglie, an individual commonly known as an informer or informant.

In the prosecution of crime, the government is frequently called upon to use witnesses who are accomplices or informers. Often it has no choice. The government must rely upon witneses or transactions, such as they are. The law permits the use of informers, provided the rights of the defendants are not violated and, therefore, whether or not you

approve of the use of informers should not enter into your deliberations.

The fact that Boriello, Florio, Portman and Travers have pleaded guilty to a serious crime, and the fact that Visceglie has been convicted of a serious crime, especially crimes bearing on their veracity, may be considered by you as bearing on their credibility as witnesses in this case. Their testimony should be viewed with caution and scrutinized with care. Was any of their testimony a fabrication inspired by any motive of reward, of self-interest or hostility to the defendants? Were they induced to give false or colored testimony against the defendants by a promise or a hope or an expectation of favorable consideration by the government in connection with these or other matters? If you find that this was so, you ought unhesitatingly to reject it.

There is no requirement in the federal courts that the testimony of an accomplice be corroborated. The government contends that the testimony of the accomplices here is corroborated by other evidence with respect to several key portions of their testimony. However, even without such corroboration, conviction may rest upon the testimony of an accomplice, if you believe it and find it credible. It does not follow that because a person has acknowledged participation in the crimes charged against the defendants that he is incapable of giving a

true version of what he testified to in the case on trial.

After a cautious and careful examination of the testimony of an accomplice or an informer and his demeanor upon the witness stand, if you are satisfied that he told the truth here as to certain events, there is no reason why you should not accept it as credible and act upon it accordingly.

As I advised you at the start of this trial, the indictment is merely an accusation, a charge. It is not evidence or proof of a defendant's guilt and no inference of any kind may be drawn from the indictment.

The Government has the burden of proving the charges against each defendant beyond a reasonable doubt. It is a burden that never shifts and remains upon the Government throughout the entire trial. A defendant doesn't have to prove his innocence. On the contrary, he is presumed to be innocent of the accusation contained in the indictment.

The presumption of innocence was in his favor at the start of the trial, continued in his favor throughout the trial, is in his favor even as I instruct you now. It remains in his favor during the course of your deliberations in the jury room.

It is removed only if and when you are satisfied that the Government has sustained its burden of proving the

guilt of a defendant beyond a reasonable doubt.

Now, what is a reasonable doubt? It is a doubt based on reason, which arises from the evidence or lack of evidence in the case. It is a doubt that a reasonable man or woman might entertain. It is not a fanciful or speculative doubt; it is not an imagined doubt, it is not a doubt that a juror might conjure up in order to avoid performing an unpleasant task or duty. It is not proof to an absolute certainty. Let me repeat -- it is a reasonable doubt. It is a doubt that appeals to your reason, to your judgment, your common understanding and your common sense -- a doubt that would cause you to hesitate to act in matters of importance in your daily lives. On the other hand, the Government does not have to prove the guilt of the defendants beyond all possible doubt, or to a positive certainty. If that were the rule, few people, however guilty they might be, would be convicted. If, when you consider the evidence in this case, you have reasonable doubt that the Government has proved any element of the crime charged, then you must return a verdict of acquittal. You may not return a guilty verdict simply because you feel that it is more likely than not that the defendant committed the crime charged. A guilty verdict is only appropriate if each and every one of you is satisfied that the defendant's guilt has been proved beyond a reasonable doubt.

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The indictment in this case contains two counts. Each of these counts charges a separate offense, or crime. Each of the defendants before you is charged in Count One; two of the defendants are charged in Count Two.

It is your obligation to consider separately each of the individual charges, or counts of the indictment, and to decide whether, as to each count, the government has or has not sustained its burden of proving beyond a reasonable doubt the guilt of each defendant of the charge in that particular count.

The indictment names five defendants. Only three of these defendants are on trial before you. They are: Matthew Madonna, also referred to during the trial as Paul DeRobertis, Salvatore Larca, and Richard Klinger. Richard Klinger is named in only Count One.

These are the only persons whose guilt or innocence you must announce in your verdict. In the determination of innocence or guilt, you must bear in mind that guilt is personal. The guilt or innocence of the defendants on trial before you must be determined separately with respect to them, solely on the evidence presented, or the lack of evidence. In other words, the case against each defendant stands or falls upon the proof or lack of proof of the charges against him, and not against someone else, although, as I will explain to

you shortly, in considering a particular defendant's guilt or innocence, you may have to determine the nature of the participation, if any, of the other named defendants.

Some of the defendants and co-conspirators named in the indictment -- defendants Joseph Boriello and Josephh Florio, and some co-conspirators not named in the indictment Jan Portman and Gene Travers, are not on trial here. They have pleaded guilty in this case. Those pleas are their personal statements of guilt. They are not an indication that the other defendants on trial are guilty, and you are not to consider these pleas as evidence against them.

Let me now turn to the indictment in this case. The indictment charges in two counts that the defendants, or various of the defendants, violated federal narcotics laws. The first count charges the three defendants before you, and t other named defendants, with conspiracy to violate federal narcotics laws. I will refer to the first count as the conspiracy count.

Count Two charges various of the defendants with substantive or actual violations of the federal narcotics laws. It charges Matthew Madonna and Salvatore Larca with possessing with intent to distribute approximately 32.4 grams of heroin.

Let me further explain the difference between the conspiracy count and the substantive count.

The charge in Count One, the conspiracy count, relates to a violation of the federal narcotics laws. These laws are sent out in Title 21 of the United States Code, Section 841 of Title 21 provides, in pertinent part, that:

"...it shall be unlawful for any person knowingly or intentionally -- to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance;"

Section 812 sets forth "controlled substances" in various schedules, Schedule I of Section 812 lists heroin as a controlled substance.

Finally, Sections 846 and 963 of Title 21 make it a crime to conspire to commit certain offenses, including the offenses defined in Section 841.

I shall now read Count One to you, except the alleged overt acts:

Count One:

The Grand Jury charges:

1. From on or about the 1st day of May, 1976, and continuously thereafter up to and including the date of the filing of this Indictment, in the Southern District of New York, MATTHEW MADONNA, a/k/a Paul DeRobertis, SALVATORE LARCA, JOSEPH BORIELLO, JOSEPH FLORIO and RICHARD KLINGER, the defendants and others to the Grand Jury known and unknown, unlawfull

intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1), 841(b)(1)(A) and 952(a) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants and co-conspirators unlawfully, intentionally and knowingly would import into the United States from other countries and distribute and possess with intent to distribute Schedule I narcotic drug controlled substances, the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1), 841 (b)(1)(A) and 952(a) of Title 21, United States Code.

A JUROR: We are all lost.

THE COURT: I only read it to you.

A JUROR: We don't have it here.

THE COURT: I read it to you.

THE FORELADY: I understand that, but I was lookin for it in the paper.

THE COURT: Do you want me to read it again?

THE FORELADY: Please. You were going kind of fast.

THE COURT: I will read Count 1 only and not the overt acts, which I will read subsequently.

1. From on or about the 1st day of May, 1976, and

continuously thereafter up to and including the date of the filing of the Indictment, in the Southern District of New York MATTHEW MADONNA, a/k/a Paul DeRobertis, SALVATORE LARCA, JOSEPH BORIELLO, JOSEPH FLORIO, and RICHARD KLINGER, the defendants and others to the Grand Jury known and unknown, unlawfully, intentionally and knowingly combined, conspired confederated and agreed together and with each other to violat Sections 812, 841(a)(1), 841(b)(1)(A) and 952(a) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants and co-conspirators unlawfully, intentionally and knowingly would import into the United States from other countries and distribute and possess with intent to distribute Schedule I narcotic drug controlled substances, the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1), 841(b)(1)(A), and 952(a) of Title 21, United States Code.

In order to find any of the defendants guilty of a conspiracy, as charged in Count 1, you must be satisfied that the government has proved the following elements beyond a reasonable doubt:

First: You must find the existence of the conspiracy charged in Count One. In this regard, you must find that some time between May 1, 1976, and September 3, 1976

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in the Southern District of New York, -- and I charge you that Manhattan and Bronx Counties are within the Southern District of New York -- an agreement existed between all of the defendants on trial or between any two or more of them to violate federal laws prohibiting the distribution and possession with the intent to distribute heroin.

In this regard, you need not find that the conspiracy existed for the entire time mentioned in the indictment, or that the agreement was to accomplish all the objectives listed in the indictment. It is sufficient if it is shown that the agreements existed for any part of the time alleged, and that its purpose was either to distribute or possess with intent to distribute heroin. Also, as I shall explain in further detail later, you need not find that all the persons mentioned reached an agreement. An agreement between any two of the defendants or between any one defendant and another alleged co-conspirator is sufficient.

Second: That while the conspiracy was still in existence, the defendant whose guilt or innocence you are considering knowingly and wilfully associated himself with the conspiracy with knowledge of its alleged criminal purpose.

Third: That while the conspiracy was still in existence, at least one of the alleged conspirators, not necessarily the defendant you are considering, knowingly

committed at least one of the overt acts set forth in the indictment at or about the time and place allged; and that such act was committed in furtherance of the conspiracy.

If the government fails to establish each of these three elements as to any of the defendants, beyond a reasonable doubt, you must acquit those defendants as to whom the government has failed to establish any element of this count. If the government succeeds in satisfying this burden as to a particular defendant, your duty is to convict that defendant on this count.

Now let me elaborate more fully on each of the elements of Count One. As I have informed you, the first of the elements which you must find that the government has proved beyond a reasonable doubt is that the conspiracy charged in the indictment existed. First, I want to discuss with you what the term "conspiracy" means, because that term is here used in a legal context and therefore has a somewhat different meaning than it has when it is used colloquially.

What is a conspiracy? A conspiracy is a combination or agreement, of two or morepersons, to accomplish a criminal or unlawful purpose. The gist of the crime of conspiracy is the unlawful combination or agreement to violate the law. Whether or not the conspirators finally accomplished what is alleged they conspired to do, is immaterial. That is

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to say, the government is not obliged to prove that a purpose of the conspirators was attained.

A conspiracy to commit a crime is an entirely separate and distinct offense from the substantive crime which is the object of the conspiracy. In order to find a defendant guilty of conspiracy, there is no need to prove that the substantive crime which is the object of the conspiracy has been committed. The essence of the crime of conspiracy is an agreement or understanding to violate other laws. Thus, it is a criminal offense if two or more persons conspire to commit an offense against the United States, and one or more of such persons does any act to effect the object of the conspiracy.

It has often been said that a conspiracy is a partnership in crime in which each member becomes the agent of every other member. To establish a conspiracy, however, the government is not required to show that the alleged conspirators sat around a table and entered into a solemn compact, orally or in writing, stating that they have formed a conspiracy to violate the law and setting forth details of the plans. It is sufficient if two or more persons, in any manner through any contrivance, impliedly or tacitly, come to a common understanding to violate the law. Express language or specific words are not required to indicate assent or attachment to a conspiracy. On the other hand, mere

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similarity of conduct among various persons, and the fact that they may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy.

If, upon consideration of all the evidence, direct and circumstantial, testimonial and documentary, you find beyond a reasonable doubt that the minds of at least two of the alleged conspirators met in an understanding way and that they agreed, as I have explained a conspiratorial agreement to you, to work together in furtherance of the unlawful scheme alleged in the indictment, then proof of the existence of the conspiracy is satisfied.

If you find that a conspiracy existed beyond a reasonable doubt, then you must consider the second element of the conspiracy count; that is, whether the government has established beyond a reasonable doubt that the defendant whose guilt or innocence you are considering knowingly and wilfully became a participant in the conspriacy with knowledge of its alleged criminal purpose, and in furtherance of its unlawful objectives.

You may not assume that a defendant joined a conspiracy simply because you are convinced that he knew or was associated or he had other dealings with people who conspired to violate the law.

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I charge you that mere association, even close or repeated association, with some other alleged member of the conspiracy is not sufficient, in and of itself, to support a finding that a defendant was a member of the alleged conspirac

In addition, I instruct you that none of the following is sufficient, in and of itself, to support a findi that a defendant was a member of the alleged conspiracy: mere attendance at a meeting with co-conspirators; or mere presence at the scene of the crime; or mere knowledge of conspiratorial acts or objectives, or mere unwitting participation.

The mere fact that two persons or more persons are on trial together cannot be considered in any way as indicati that the participated in a conspiracy to violate the law.

All of the conspirators need not be acquainted with each other. They may not have previously associated together. One of the defendants may know only one other member of the conspiracy, but if he enters into an unlawful agreement with that other member of the conspiracy, he becomes a party thereto.

To conclude that a defendant was a member of a conspiracy, you must find that he knew the unlawful purpose of the alleged conspiracy, that knowing the purpose he intentiona joined in the endeavor, and that he had an interest, in making

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it succeed. It is not necessary, however, that you find that each conspirator was fully informed as to the details or the full scope of the conspiracy, or participated in every aspect of the conspiracy. Similarly, you need not find that all of the alleged co-conspirators knew each other. A person becomes a member of a conspiracy by associating himself with a common plan or scheme, knowing the central aim or principal purpose o that common plan or scheme and intending to help bring about its success.

To repeat, in order to find a defendant guilty on the conspiracy count, you must find beyond a reasonable doubt that the defendant acted knowingly and wilfully. Specifically you must find that the defendant knowingly and wilfully became a participant in the conspiracy with knowledge of its unlawful purpose and intending to help bring about its success.

Knowledge, wilfulness and intent exist in the mind. Since it is not possible to look into a man's mind to see what went on, the only way you have of arriving at a decision on th questions is for you to take into consideration all the facts and circumstances shown by the evidence, including the exhibits, and to determine from all such facts and circumstanc whether the requisite knowledge, wilfulness and intent were present at the time in question.

An act is done knowingly if it is done voluntarily

and purposefully and not because of mistake, inadvertence or other innocent reason.

An act is wilful if it is done knowingly, deliberately and with an evil purpose. An act is not done wilfully if it is done as a result of a mistake, carelessness, lack of an evil purpose, or for some other innocent reason.

It is not necessary for you to find that a defendant knew he was breaking a particular law and whether or not an act is knowing or wilful has nothing to do with the defendant's personal or proviate reasons for committing the act, so long as the act is done with an evil purpose.

The government has contended that various of the defendants attempted to conceal their activities, for example, through the use of codes, a fictitious name or false documents. Such evidence, if you find it credible, may be considered by you in determining the issue of knowledge, wilfulness and intent.

Once you have found the conspiracy to exist and a particular defendant to have knowingly and wilfully participated in it with knowledge of its unlawful purpose, the extent of his participation has no bearing on his guilt or innocence. The guilt of a conspirator is not measured by the extent of or the duration of his participation. Even if he participated in it to a degree more limited than that of his

co-conspirators, he is equally culpable so long as he was in fact a conspirator. Similarly, it is not required that a person be a member of the conspiracy from its very start. A defendant may join a conspiracy at any point while it is in progress, and be held responsible for all that has been done before he joined, and all that may be done thereafter during the existence of the conspiracy and while he remains a member of the conspiracy.

Moreover a conspiracy, once formed, is presumed to have continued until its objectives have been accomplished or until there has been an affirmative act by the members of the conspiracy to terminate it. Similarly, once a person is found to be a member of a conspiracy, he is presumed to continue his membership until the termination of the conspiracy or until he affirmatively withdraws or disassociates himself from it.

For a single act to be sufficient to draw an actor within the ambit of a conspiracy to violate the federal narcotics laws, there must be independent evidence tending to prove that the defendant in question had some knowledge of the broader conspiracy, or the single act itself must be one from which knowledge may be inferred. Thus, absent proof of knowledge of the broader conspiracy, a single act such as delivery of drugs, or actual sale or purchase is insufficient evidence from which to draw an inference that a defendant

knew about or acquiesced in the larger conspiracy. However, conduct consisting of only involvement in a single transactio may nevertheless be treated as rationally permitting the infer ence of knowledge of the broader conspiracy where the single act itself shows so much familiarity with or high-level participation in the overall conspiracy as to be in and of itself indicative of the broader conspiracy.

Now let me instruct you as to how you are to consider the acts and statements of alleged co-conspirators.

You will recall that throughout the trial the acts and statements of one alleged co-conspirator in the absence of other alleged co-conspirators were received only with respect to the particular person or persons making them.

If you find that a conspiracy existed, then in considering the second element, whether or not a particular defendant was a member of the conspiracy, you may rely not only on his own statements but on the statements and declarations of the other alleged co-conspirators.

Moreover, if you find that a conspiracy existed, then any act or declaration made during the conspiracy, and in furtherance of it by a person found by you to have been a member of the conspiracy may be considered against a defendant, who you have found was also a member, even though such act or declaration was made in the absence and without the

knowledge of that defendant.

Conversely, such acts or declarations of a conspirator which were made before the existence or after the termination of the conspiracy or which were not in furtherance of the conspiracy, may be considered only against the person who made them.

In proving the charges against the defendants on trial before you, the Government introduced evidence of the acts and declarations of co-conspirators who are not on trial here and are not named as defendants. You may not drawn any inference, favorable or unfavorable, towards the Government or the defendants on trial from the fact that certain persons were not named as defendants or conspirators or having been named, are not on trial before you now. You are not to speculate as to the reasons why certain individuals are not on trial or are not named as defendants. Those matters are wholly outside your concern and have no bearing on your function as jurors.

Now we come to the third element you must consider as to Count One. If you have found that the alleged conspiracy existed and that the defendant whose guilt you are considering was a member of it, then you must consider the "overt act" requirement.

The offense of conspiracy is complete when the

unlawful agreement is made and any single overt act is done by one of the alleged conspirators in furtherance of the conspiracy.

By the term "overt act" we mean an act committed in an effort to accomplish or further some object or purpose of the conspiracy. The overt act in this sense need not be a crime itself. It must, however, be an act which follows from the conspiracy and is directed toward accomplishment of the criminal purpose of the conspiracy. I will now read the overt acts charged in the indictment:

Overt Acts:

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York and elsewhere:

1. On or about July 12, 1976, the defendant Joseph Florio in California spoke on the telephone with co-conspirator Eugene Travers ("Travers") in the Bronx, New York, and asked Travers if he would deliver heroin to New York from outside the country:

2. On or about July 13, 1976, defendant Richard Klinger in California spoke on the telephone with co-conspirator Jan Portman ("Portman") in Florida and asked Portman if she would bring heroin into the country:

3. On or about July 20, 1976, in the Bronx,

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New York, Joseph Boriello told co-conspirator Travers that if Travers was arrested, Boriello and the people he worked with would furnish Travers with an attorney and provide him with $100,000 in return for which Travers was to remain silent and immediately flee the country and not return;

4. On or about August 17, 1976, co-conspirator Travers arrived in Honolulu, Hawaii, from Bangkok, Thailand, carrying approximately seven pounds of ninety-seven percent pure heroin in two suitcases;

5. On or about August 18, 1976, co-conspirator Portman arrived in Honolulu, Hawaii, from Bangkok, Thailand, carrying approximately five pounds of ninety-seven percent pur heroin with her;

6. On or about August 19, 1976, in New York City, defendant Matthew Madonna rented a rent-a-car under the false name of "Paul DeRobertis" using an American Express card issue in the name of Paul DeRobertis, and a Florida driver's license issued in the name of "Paul DeRobertis" to which a photograph of Matthew Madonna himself was affixed;

7. On August 20, 1976, defendant Joseph Boriello arrived in New York City from Bangkok, Thailand;

8. On August 20, 1976, defendant Joseph Boriello met defendant Salvatore Larca in the vicinity of Salvatore Larca's home on Delanoy Avenue in the Bronx, New York;

9. On August 20, 1976, in the vicinity of co-conspirator Travers' apartment on Creston Avenue in the Bronx, defendant Joseph Boriello, placed the two suitcases referred to in Overt Act Number Four in the rent-a-car referred to in Overt Act Number Six;

10. On August 20, 1976, in the vicinity of 58th Street and 5th Avenue in Manhattan, defendants Matthew Madonna and Salvatore Larca arrived in a Cadillac registered to Salvatore Larca's wife.

11. On August 20, 1976, in the vicinity of 58th Street and 5th Avenue in Manhattan, defendants Matthew Madonna and Salvatore Larca met with defendant Joseph Boriello.

12. On August 20, 1976, in the vicinity of 58th Street and 5th Avenue in Manhattan, defendants Matthew Madonna and Salvatore Larca entered the rent-a-car referred to in Overt Act Number Six which contained the suitcase referred to in Overt Act Number Four.

You need only find beyond a reasonable doubt that any one and not all of these acts was committed, and that it was committed during and in furtherance of the conspiracy by a member of the conspiracy.

If you find beyond a reasonable doubt that such a conspiracy existed as charged in the indictment, and that during the existence of the conspiracy at least one of the

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overt acts alleged was knowingly done by one or more of the conspirators in the furtherance of some object of the conspir proof of the conspiracy offense is then complete. It is complete as to each defendant found by you, the jury, beyond a reasonable doubt, to have been knowingly and wilfully a member of the conspiracy at the time the overt act was committed, regardless of which of the conspirators committed the overt act.

While the indictment charges in Count One that the conspiracy existed from on or about May 1, 1976 and continuously thereafter up to and including September 3, 1976, I repeat that it is not essential that the government prove that the conspiracy started and ended on or about those specific dates. It is sufficient if you find that in fact a conspiracy was formed and existed for some substantial time within the period set forth in the indictment, and that at least one overt act was committed in furtherance thereof in that period.

Similarly, it is not necessary for the government to prove that each member of the conspiracy committed or participated in any particular overt act, since the act of any member of the conspiracy done in furtherance of the conspiracy becomes the act of all the other members.

In addition, the government must show that at leas

one overt act was committed in the Southern District of New York. I charge you that the Southern District of New York includes the Borough of Manhattan and the Bronx, New York.

Now, let us turn to Count Two of the indictment, which reads as follows:

Count Two:

The Grand Jury further charges:

On or about the 20th day of August, 1976, and in the Southern District of New York, MATTHEW MADONNA, a/k/a Paul DeRobertis, SALVATORE LARCA and JOSEPH BORIELLO, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 32.4 grams of heroin.

With respect to this count, the applicable statute is one which I have already read to you in connection with Count One, namely, Section 841 of Title 21 of the United States Code. Once again, Section 841 provides in pertinent part:

"It shall be unlawful for any person knowingly or intentionally to distribute or possess with intent to distribute...a controlled substance."

In order to return a verdict of guilty for the crime charged in Count Two of the indictment, you must find

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three elements to have been proved beyond a reasonable doubt:

(1) First, you must find beyond a reasonable doubt that on or about the date specified in each count, the defendant or defendants whose guilt or innocence you are considering did distribute or possess with intent to distribute a narcotic drug controlled substance.

(2) Second, you must also find beyond a reasonable doubt that the substance which was possessed was, in part, a Schedule I narcotic drug controlled substance.

(3) Finally, you must find beyond a reasonable doubt that the defendant you are considering committed the act of distribution or possession with intent to distribute unlawfully, wilfully, intentionally and knowingly.

The second count charges Madonna and Larca with possessing with intent to distribute approximately 32.4 grams of heroin. This count involves the "controlled delivery" referred to during the course of the trial. The government contends that approximately 7 pounds of heroin was successfully imported into the United States in Honolulu. That heroin was seized and a non-narcotic substance was substituted for most of that heroin. However, a small portion of actual heroin was left, and, the government further contends, found its way to Madonna and Larca.

Now, let me say a few words about each of these

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elements. With regard to the first element, you will note that I used the phrase "possess with intent to distribute." What does that phrase mean? Well, the word "possess" as used in the phrase "possess with the intent to distribute," has its everyday common meaning, that is, to have something within one's control.

The law recognizes two kinds of possession: actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it.

A person who, although not in actual possession, knowingly has both the power and the intention, at a given time, to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

The word "distribute" means the actual, constructive or attempted transfer of the drug.

You must find beyond a reasonable doubt that the defendant was aware of the presence of the substance he was charged with possessing and knew it was a controlled drug. The government is not required to prove both distribution and possession with intent to distribute. It is sufficient for the government to prove either.

As to the second element, I have already instructed

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you that heroin is a narcotic drug controlled substance. However, you must still be convinced beyond a reasonable doubt that the substance which various of the defendants are charged with distributing or with possessing with intent to distribute was, in fact, heroin.

As to the third element, an act is done knowingly if it is done voluntarily and purposefully and not because of mistake, coercion, inadvertence or other innocent reason. As I have already indicated to you with regard to the conspiracy count, an act is wilful if it is done knowingly, deliberately and with an evil purpose. An act is not done wilfully if it is done as a result of mistake, carelessness, lack of an evil purpose or for some other innocent reason.

A defendant may be found guilty of the crime charged here if he has aided or abetted the commission of the crime in violation of Title 18, United States Code, Section 2. This provides that:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

"Whoever wilfully causes an act to be done which, if directly performed by him or another, would be an offense against the United States, is punishable as a principal."

Thus, a person who aids or abets another to

commit an offense is just as guilty of that offense as he would be had he committed it himself.

Before you can conclude that a person aided or abetted you must first find that the substantive crime charged in this case, possession with intent to distribute heroin, was in fact committed. Secondly, you must determine that the defendant in some way knowingly and intentionally associated himself with the criminal venture, that he participated in it as something he wished to bring about and that by his actions he tried to make the crime succeed. You must find more than the defendant's mere presence during or knowledge of the offense.

In other words, if one, fully aware of what he is doing, plays a significant role in furthering and facilitating an act prohibited by law, he is equally as guilty as the person who actually and physically performs the act or acts, even though the latter played a greater part in the perpetration of the crime. Accordingly, you may find both defendants guilty of the offense as charged in Count Two if you find that one defendant named in that count committed the offense charged and that the other defendant aided and abetted him.

There has been some testimony by Mr. Visceglie that he had some dealings with Larca and Madonna in 1972. Let me repeat the instructions that I gave you at that time. The

defendants here are not being charged with acts done in 1972, and you cannot use those acts to determine whether they committed crimes charged in the indictment.

Nor may evidence of an alleged earlier similar act be considered for any other purpose whatever, unless you first find that the other evidence in the case, standing alone, establishes beyond a reasonable doubt that the accused did the particular act charged in the indictment in this case.

However, if you do find, beyond a reasonable doubt, based solely on evidence other than prior similar acts, that the defendants Madonna and Larca did any of the acts charged in the indictment in this case, then you may consider evidence as to prior similar acts in determining the state of mind or intent of the defendants at the time they did those acts. That is to say, if prior similar acts have been established by the government then you may, but are not obliged to, draw the inference that, in doing the act charged in this case, the accused acted knowingly and intentionally, and not because of mistake or accident or other innocent reason .

I charge you that the evidence here as to prior similar acts can only apply to defendants Madonna and Larca and may not be used against defendant Klinger. Similarly,

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but for different reasons, the telephone conversation on August 20th between Jan Portman and Richard Klinger can only apply to Klinger and may not be used against Madonna and Larca -- the conversation occurred after Madonna and Larca were in custody.

With respect to the substantive count alone, an admission or incriminating out-of-court statement made by one defendant may not be considered as evidence against another defendant not present when the statement was made.

As I have already instructed you, a different rule applies with respect to the conspiracy count.

I will now address myself to more general considerations which you must bear in mind during your deliberations.

First, I must emphasize again that there are three defendants on trial here and must consider separately whether the defendants charged have been proved guilty beyond a reasonable doubt.

It is your duty to give separate, personal consideration to the case of each defendant. When you do so, you should analyze what the evidence in the case shows with respect to that individual, leaving out of consideration entirely any evidence admitted solely with regard to other defendants. Each defendant is entitled to have his case determined from evidence as to his own acts and statements and conduct, and any

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other evidence in the case which may be applicable to him. The fact that you may find one or more of the accused guilty or not guilty on any particular count should not influence your verdict with respect to the other defendants or with respect to any other count.

During the course of this trial, the government prsented certain tangible evidence which was derived from searches and seizures by law enforcement officers, for example narcotics, photographs and passports. The laws which govern the legality of searches and seizures are designed to protect the right of privacy of the persons and places which were searched. With respect to all the evidence in this trial which has been the product of a search and seizure, I have found that the searches and seizures were conducted according to law or that the defendant raising a question of the legality of a particular search and seizure had no right or interest which could have been violated by an improper search and seizure. Thus, during your deliberations, questions regarding whether or not any particular evidence was legally seized are not before you. This is a question for the consideration of the Court alone.

Two of the defendants in this case have not taken the stand to testify.

As I told you before, the government has the burden

of proving the charges against each defendant beyond a reasonable doubt. A defendant does not have to prove his innocence. A defendant has the right to remain silent. He do not have to testify, or present any evidence or witnesses in his behalf, and you may not draw any inference or conclusion or form any prejudice because a defendant did not testify or present evidence.

On the other hand, the law permits a defendant to testify in his own behalf if he wishes to do so. Richard Klinger has elected to testify in this case. The testimony of a defendant must be considered by you as would the testimony of any other witness. You must determine, therefore the credibility of Richard Klinger's testimony and in so doing you must consider the deep personal interest which every defendant has in the outcome of his case. Indeed, it is fair to say that a defendant has the greatest stake in the outcome. A defendant's intterest in the result of his trial is of a character possessed by no other witness. That interest requires that you receive such testimony with caution and subject it to the most careful scrutiny.

However, it by no means follows that simply because a person has a vital interest in the end result that he is not capable of telling a truthful, candid and straightforward story, and it is for you to decide to what extent, if at all,

his interest has affected or colored his testimony.

Now, under your oath as jurors, you cannot allow a consideration of the punishment which may be inflicted upon a defendant, if he is convicted, to influence your verdict in any way or in any sense enter into your deliberation.

The duty of imposing sentence rests exclusively upon the Court. Your function is to weigh the evidence in the case and to determine the guilt or innocence of a defendant solely upon the basis of such evidence and the law.

You are to decide the case upon the evidence, and the evidence alone, and you must not be influenced by any assumption, conjecture, or sympathy, or any inference not warranted by the facts.

If you fail to find beyond a reasonable doubt that the law has been violated, you should not hesitate for any reason to find a verdict of acquittal. But on the other hand, if you should find that the law has been violated as charged, you should not hesitate because of sympathy or any other reason, to render a verdict of guilty.

I would like to point out that you should not enter the jury room with any preconceived pride of opinion. You should not be unwilling to be convinced by intelligent argument with your fellow jurors. Each juror has to answer to his or her own conscience, and each has to decide this case

for himself or herself, but in so doing you should be willing to consider the views of the other jurors and to talk things out and try your best to reach a unanimous agreement.

Your verdict must be one with which each juror agrees.

If during your deliberations you deem it necessary to have a copy of the indictment, or desire any of the exhibits, they will be sent in to you on request. If you wish any portion of the testimony read, any of the tapes replayed, or the Court's charge reread, that will be done.

In conclusion, let me say: Every criminal case is important. It is important to the government and it is important to the defendant. It is your obligation to decide the case on the evidence and on the law as I have charged it to you; I give the case to you with the assurance that you will do just that.

Now, before I do that, there is one final step before you get the case.

I have just read my charge. Counsel have the right to go over with me in the robing room to determine whether I have made a mistake or whether I ought to make, read an additional one to you or correct something. After we have conferred on that, you will get the case.

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(In the robing room.)

THE COURT: All right. I will start with you, Mr. Lippel.

MR. LIPPEL: Your Honor, just one thing that I think requires clarification. I am referring to page 58.

THE COURT: I don't know what the pages are. Read it.

MR. LIPPEL: I'm sorry. I will read it.

THE COURT: I see.

MR. LIPPEL: Where a paragraph begins, "On the other hand, the law permits a defendant to testify on his own behalf."

Your Honor, I think the use of the language "on the other hand" perhaps the jury might get the impression that the entire previous paragraph in which there is talk of the fact that the government has the burden of proof in the case against each defendant beyond a reasonable doubt, they may feel that that's negated. I merely ask that your Honor charge the jury additionally that the burden of proof does not shift, that the government still must prove its case beyond a reasonable doubt.

THE COURT: Rejected. I have made that clear. There is no possibility of confusion.

What else?

MR. LIPPEL: That's it. Exception.

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MR. ALCH: Your Honor, referring to page 51, when your Honor was reading the count or referring to Count One of the indictment.

THE COURT: One?

You mean Count Two.

MR. ALCH: Excuse me, Count Two, I'm sorry.

Your Honor made reference to the government's theory of prosecution and I would respectfully suggest that a balancing reference be made with regard to the contentions of the defendant.

THE COURT: What is that? You mean it refers-- you mean page 50?

MR. ALCH: 51, your Honor.

THE COURT: How does it read?

MR. ALCH: You are explaining the government's theory and winding up by saying "A small portion of actual heroin was left and the government contends found its way to Madonna and Larca."

My request is that there be a balancing reference made to the defense of each individual defendant.

THE COURT: No. I wasn't doing that. I was only doing that in order to explain the -- give the explanation of what was involved in Count One. That was merely to explain what the controlled substance was. I wasn't giving the

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government's theory.

MR. ALCH: Two more, your Honor. On page 53, when your Honor was referring to --

THE COURT: Is this the third element?

MR. ALCH: That's correct, your Honor, and it deals with reference to aiding and abetting, I believe.

THE COURT: Aiding and abetting is something else.

MR. ALCH: Then I must have the wrong page. With regard to aiding and abetting.

THE COURT: What's the first line?

MR. ALCH: Oh, yes. It is the next page, which wa unnumbered. I'm sorry.

My requestion would be that the jury be instructed that in order to be guilty as a result of aiding and abetting, the aiding and abetting must be with the knowledge required when a substantive act is being done by the perpetrator.

THE COURT: I think that's clear. I say that "You must determine that in some way he knowingly and intentionally associated himself."

There is no problem on that, Mr. Alch.

MR. ALCH: My last one, your Honor, on page 60. My recollection is that in the second paragraph your Honor omitted to read the words in the second paragraph. In other

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words, "it must be unanimous." I know that you have said "unanimous" in the first paragraph, but you left out the last sentence of the second paragraph.

THE COURT: No, the first paragraph, "Try your best to reach a unanimous agreement."

MR. ALCH: No, the second paragraph. You left out the next sentence. "In other words, it must be unanimous."

THE COURT: I don't have that on my copy.

MR. BROWN: It's on all our copies. When you left it out, it was conspicuous.

THE COURT: All right. I will explain to them, it must be unanimous. I don't know how I did that. All right --

MR. BROWN: It could be significant to them.

THE COURT: I will have to borrow this.

MR. ALCH: Except to join with Mr. Brown in whatever he had, that's all I have, your Honor.

MR. BROWN: Judge, my only objection or exception or complaint is that as of page 32, which is marked 22, it is 33 in sequence, but 22 by your count, it relates to the business of the overt act, and at the end of that, which deals with conspiracy, you say "This is a criminal offense if two or more people agree to commit an offense and one or more of said persons do any act to further the objectives of the

conspiracy.

THE COURT: What a minute. What I have is --

MR. BROWN: I am sorry. I changed the numbers. I have 33, which is the old 22. I marked it 33. It is 22 in your numbering, Judge.

THE COURT: All right. I have it.

MR. BROWN: The concept there of any act is not clearly in terms of the conspiracy and the theories that you generally have woven through it as to the overt acts, and it might be misleading.

I was wondering if you would accept the request to read that "if one or more persons do any overt act to further the objectives of the conspiracy".

I realize that on 41 -- which I have renumbered 47 -- you do go into that, and you say, "If you have found the alleged conspiracy existed and the defendant whose guilt you are considering was a member, then you must consider the overt act requirement."

When it comes out like this, it does not emphasize any overt acts.

THE COURT: Well, I think anything further would add to the confusion. I think I explained that they had to find an overt act.

MR. BROWN: The only objection I have, Judge, is

page 37, which I have numbered 41.

"The government has contended that vrious of the defendants attempted to conceal their activities, for example, through the use of codes, a fictitious name or false documents. Such evidence, if you find it credible, may be considered by you in determining the issues of knowledge, wilfulness and intent."

That "various of the defendants attempted to conceal their activities . . . through the use of codes, fictitious name or false documents." I think the fictitious name is certainly pertinent, but I don't recall the use of codes, unless we are talking about the twenty-dollar bill.

THE COURT: Portman said, "Is it brown?"

MR. BROWN: The young lady saying it was brown, a brown substance. That would be my objection. I don't recall your interpretation of the code.

I have no other objections.

MR. FLANNERY: I have a couple of matters, your Honor. I know that it is unusual for the Government --

THE COURT: The Government hasn't any right to object to the charge.

MR. FLANNERY: I am not going to object, your Honor. I am going to suggest that there are a couple of things left out in your charge.

MR. BROWN: What right does the Government have in this? I don't know.

THE COURT: I don't know, either.

MR. FLANNERY: Perhaps you will bear with me for a moment. You did not state that one of the objects of the conspiracy was to import, which is Section 951. You referred to Section 912. When you read the count itself, you did not separate it out to explain that it was a part of the agreement that importation was one of the elements.

THE COURT: That's right. I saw that when I was reading it. But it is not necessary, I don't think.

MR. FLANNERY: I am still not clear in my own mind. I know I must appear very dumb about this, but with respect to pages 54 and the following page --

THE COURT: You mean the similar acts?

MR. FLANNERY: The way it appears it looks to me that they first have to find the crime beyond a reasonable doubt before they can find the similar act, and therefore the similar act becomes superfluous.

THE COURT: You will notice I didn't say "beyond a reasonable doubt". I said, "if they committed the act", because if they had in fact committed the act, did they commit it knowingly and wilfully.

MR. FLANNERY: The notion is, however, "If you do

find beyond a reasonable doubt that they did any of the acts, then you can consider what their state of mind was."

I am sorry. Until this moment it didn't occur to me.

THE COURT: Did they do the acts? If it was not knowingly and wilfully, they can't convict.

MR. FLANNERY: On page 55 there is reference to "With respect to the substantive count alone, an admission or incriminating out-of-court statement made by one defendant may not be considered as evidence against another defendant not present when the statement was made."

It wasn't clear in my mind whether you were referring to admissions or statements made during the course of what was described as the joint venture in '72.

MR. BROWN: That was covered.

THE COURT: I covered that. What I am saying to them is that they can't consider any hearsay statements to convict under that count. They can consider such statements to convict on Count 1.

MR. FLANNERY: But they can consider, it is my understanding of the law, Larca's statement against Mr. Madonna during the course of the similar acts. This was a joint venture.

THE COURT: You are talking about Count 2, not

Count 1.

MR. FLANNERY: The similar act also bears on the state of mind as to Count 2. The similar act is admissible under the state of mind --

THE COURT: What do you mean by the similar acts?

MR. FLANNERY: I am talking about the Visceglie situation.

THE COURT: But we are talking about the substantive count, Count 2, and I thought I had made clear --

MR. BROWN: It has been made clear. You have already given the charge on that.

Judge, I don't understand the Government's position on this.

MR. FLANNERY: If you will bear with me, I will try to explain it.

MR. BROWN: Judge, my understanding is that he has no standing to object.

MR. FLANNERY: Your Honor, my understanding of the law is that, for example, Boriello's statements --

THE COURT: But I made it clear. We are talking about Count 2, the substantive Count, and I say that it will apply with respect to the conspiracy count.

MR. FLANNERY: My problem is that the statements made by Boriello are adminissible during the course of the

joint venture, which is Count 2, against Madonna and Larca, when he, Boriello, was acting as their agent.

I mean, there isn't any confusion about this statement, that, for example, the out-of-court statement made by Boriello can be considered as evidence against Madonna and Larca for the substantive count, that is, what he did in the agency relationship, and what for the purposes of Count 2 is considered as a joint venture is admissible against Madonna and Larca.

THE COURT: No; I don't agree with you.

MR. FLANNERY: I think that is a clear statement of the law.

THE COURT: It may be, but we will have to go on without that.

All right. Anything else?

MR. ALCH: No, sir.

MR. LIPPEL: No, sir.

MR. BROWN: No, sir.

THE COURT: The only thing I am going to do is that I will make this correction on there, about the unanimous verdict.

MR. BROWN: For that reason only, because they might find it significant.

THE COURT: All right. I will tell them we had

different texts.

(In open court:)

THE COURT: Now, ladies and gentlemen, if you go back to the last page, the second paragraph, I read, "Your verdict must be one to which each juror agrees", and I did not read, "In other words, it must be unanimous." That is because it was not on my copy, and for no other reason.

All right. Will you swear in the marshal.

(The deputy marhal was duly sworn.)

(The alternate jurors were excused, with the thanks of the Court, and at 12:10 p.m., the jury retired in the custody of the deputy marshal to deliberate upon a verdict.)

THE COURT: I want to tell the alternate jurors that they are now excused. I am going to ask them, however, to leave their telephone numbers with the clerk, just in the event that there may be some need for them in the next couple of days.

(At 12:15, jury in box:)

THE COURT: We had forgotten to give you your notes. Now, this sheet, which the clerk will hand to the forelady, is merely to help you in recording your verdict.

(The jury left the courtroom to resume deliberating upon a verdict.)

THE COURT: The jury will go to lunch at one o'clock, and I am going to go upstairs, gentleman. If there are any requests for the indictment or any exhibits and so forth, unless there is some dispute among you about it, I hope you can agree that we don't have to bring the jury back for that, that you will agree among yourselves as to what that is.

Do I have your agreement on that, Mr. Alch?

MR. ALCH: Yes, your Honor.

MR. BROWN: I have no objection, your Honor.

MR. LIPPEL: No objection, your Honor.

MR. BROWN: The agreement, I think, would be that we examine it together.

THE COURT: Yes. I will come downstairs if I must.

MR. BROWN: May we stay in the courtroom, your Honor?

THE COURT: Yes. Is that agreeable to you, Mr. Flannery?

MR. FLANNERY: Certainly.

MR. BLOSSNER: Your Honor, if the jury is going out for lunch, may we know where they are going, so we can avoid that place?

THE COURT: Well, I have no idea. You will have

to ask the marshal. They may have lunch in.

THE MARSHAL: They will probably be going to Aldo's, your Honor.

THE COURT: All right. We will wait for the jury, then.

(Recess.)

(At 3:05 p.m.)

(Jury in box:)

THE COURT: Ladies and gentlemen, you have asked for some exhibits, which, of course, we can give you; but you have also asked me for testimony of a lot of witnesses: Toal, Travers, White, Boriello.

Do you want us to read to you Boriello's entire testimony, or is there some portion of it that you want to hear, or some portions? Is is that you want us to read to you all of Travers' testimony, or are there some portions of it that you want to hear.

You have said "the testimony". You can't take the testimony inside. The transcript will have to be read to you. If there are portions of it that you want or if you want to have it all read, then I want to know. I am just not sure what it is that you want.

A JUROR: Boriello's testimony.

THE COURT: Do you want to have it all read to you?

A JUROR: Right.

THE COURT: The agreement between the Government and Mr. Boriello was not put in evidence, and you cannot see anything that is not in evidence.

Do you want a list of all the exhibits? I think the better thing, ladies and gentlemen, to do is for you to ask for the things that you want. There is a list of all the exhibits here, and I can give that to you.

It would appear to me that you want to make an inquiry, therefore you ought to make that inquiry, it seems to me, as to what it is that you want.

You can have all the exhibits. Any exhibits you want will be sent back to you, but it would appear to me that what you ought to be asking for is what you specifically want, so that we can find out. What exhibits do you want? Any exhibits you want you can have.

A JUROR: The reason we asked for the list, sir, is that we did not know exactly what the numbers are. Some had different numbers.

THE COURT: That is not the issue, the numbers. You don't have to worry about the numbers. If you want to see the pictures, just ask for them, the pictures of the house. If you want to see some other exhibits, just ask for them.

I think you ought to identify what you want rather than being piled up some some material that you may not want. So we will do that.

Am I to understand that out of the requests for the testimony, you want to have Boriello's testimony read? Is that correct?

A JUROR: That's correct.

THE COURT: What about the other people, Toal, Travers and White?

A JUROR: We may as well.

THE COURT: Do you want that read, too?

A JUROR: Yes.

THE COURT: I don't know. Gentlemen, do we have Boriello's testimony?

MR. FLANNERY: I have a complete transcript of the trial.

THE COURT: All right, Find it and tell me where it is, and the clerk can read it.

MR. FLANNERY: It starts at 104, your Honor, and it concludes at 415.

THE COURT: You are now requesting us to read to you three hundred pages of testimony.

A JUROR: Judge Carter, does this include the tape that Boriello had with Travers?

THE COURT: I think you are wrong. Did you say 140?

MR. FLANNERY: No: 104.

THE COURT: Ladies and gentlemen, quite frankly, I think that what I want you to do now -- this testimony is some three hundred pages in length, which is only that one witness, Boriello. Travers is about another hundred pages.

I think what you really ought to do, what I am going to ask you to do is -- and then if you want to hear a tape that has been recorded, that will be some more time. I think you ought to go back and try to indicate in your own minds what it is out of this that you want to hear, so that we can try to isolate it.

I am sure that you don't want us to reread the whole transcript of the trial, which took two weeks. I would be willing to do it. I am willing to have all the testimony that you want read, but my reason for doing this is that I have the feeling that you have not thought through what you want.

I would suggest that you go back, that you focus on what it is that you want, the portions of the testimony that you want. If you want it all, it will all be read to you, and you have asked for Toal, Travers, White and Boriello.

Please go back and sit down and discuss among yourselves what it is that you specifically want, and then we will try to take care of it.

A JUROR: The take itself, we would like to have that played.

THE COURT: Go back and discuss it among yourselves and then you can tell us what it is that you want.

A JUROR: I think we did not understand what we were entitled to.

THE COURT: You are entitled to -- I hope you want ask for it, but you are entitled to have all the testimony read. If you want to sit here for another two weeks, we can do that, but you are entitled to that.

The point is that you are now -- you have reached the point where you have heard the testimony, and there are certain portions of it that I gather that you would want to hear again. It seems to me that you should be selective with that and take what you want.

A JUROR: We will just bring back certain items that we would like to hear.

THE COURT: Why don't you go back and decide what it is that you really are interested in, what it is that you want, what it is that you are focussing on, what it is in Boriello's testimony that you want to hear, what portions

of if you think you want to hear. We will try to focus on that. Also, tell us what tapes you want. If you want us to play them back, we will do it.

The only reason I am sending you back is because I don't think that you realize what you have requested.

A JUROR: Do you have a list of the Government exhibit numbers as to what they signify?

For example, Number 17 with regard to Larca's house. Do you have that sort of a list available?

THE COURT: We have a list, but I don't think you should tie yourselves up with numbers. There are some exhibits as to which you know the subject matter. JUst ask for it by subject matter. You don't have to worry about the numbers.

If you want to see a picture of the house, the pictures and so forth, just ask for them. We will be able to get that. Don't be concerned about the numbers. You ought to be concerned about the subject matter. Just ask us for those subjects.

(At 3:10 p.m., the jury left the courtroom to resume deliberating upon a verdict.)

(At 4:05 p.m., a note was received from the jury.)

THE COURT: All right. Let's get the headphones ready. They want to hear the tape of Joe Boriello and

Eugene Travers.

Before they come out, tell the marshal that I want to know whether they want to hear both conversations. Was there a telephone conversation at the house when they came in, or was that just a conversation between the two of them?

MR. FLANNERY: There are two telephone conversations between one and one-thirty, between Travers and Boriello, and then, when Boriello gets there, there is another conversation, this one in person.

THE COURT: Tell them there are two, and by the time they come out, they can let us know, have the forelady tell us which conversation they want.

MR. BROWN: Judge, for our benefit, for the record, can we get the exhibit numbers of both of those?

THE COURT: For the tape?

MR. BROWN: Yes, please. I think the record is incomplete unless we have that.

(Pause.)

MR. BROWN: Judge, is it pertinent to ask how long we will be sitting tonight? I know we will be here tomorrow.

THE COURT: I think that I am going to let them go to dinner at about seven. After dinner, I will send them to the hotel. So seven o'clock would be a good time.

MR. BROWN: That's good, Judge. I have a full night's work at the office.

(Pause.)

MR. BROWN: Your Honor, has it been ascertained which tape they want: the phone call or the meeting?

THE COURT: I have asked the marshal to ask them. The forelady will be able to tell us which one they want, one or both, when they come out.

(Jury in box.)

THE COURT: Are you able to tell me what you would like to hear?

THE FORELADY: We would like to hear the conversation between Boriello and Travers in the apartment, the taped conversation.

THE COURT: They want to hear the conversation between Boriello and Travers in the apartment.

(Tape, Government Exhibit 51-A, was played.)

THE COURT: All right. Please collect the transcripts.

Have you gone over the exhibits that we sent in?

THE FORELADY: We didn't finish them.

THE COURT: Were they the exhibits you wanted?

JUROR NO. 8: Yes, sir.

MR. [illegible]H: Your Honor, could they be asked

specifically about 59?

THE COURT: I asked the question, Mr. Alch.

THE FORELADY: We have a list of some more things we want.

THE COURT: All right. What you should do in the future, ladies and gentlemen, you should have some envelopes and put these notes in envelopes before you pass them to the marshal.

You want us to read page 346, line 10? I think you are being mighty specific.

A JUROR: You told us to be specific.

THE COURT: Yes. I am not complaining, certainly.

Also page 298, lines 13 and 14.

MR. ALCH: MR. ALCH: Your Honor.

THE COURT: And page 298, from line 14 to the end of the page.

Page 1116. Now, you want line 6. You just want that line?

JUROR NO. 7. It went so fast, we couldn't -- we want to clarify the defense.

THE COURT: All right. Line 6 and read a couple of lines down. Also page 1118.

(Record read.)

THE COURT: All right. Did you want anything

else at this time?

THE FORELADY: No, sir.

THE COURT: All right. You may leave. Put any further notes you have in the envelopes.

(At 4:50 p.m., the jury left the courtroom to resume deliberating upon a verdict.)

THE COURT: I think I have announced to those who asked me the question, I am going to send them out to dinner about seven or seven-thirty, and from there, if they have not reached an agreement by that time, to the hotel, so you can make your plans accordingly.

(At 6:00 p.m., a note was received from the jury.)

(Court's Exhibits 1, 2 and 3 marked for identification.)

xxx

(Pictures of Salvatore Larca's home from the prosecutors' and defendants' pictures, were sent in to the jury room by agreement of counsel, without the presence of the Court.)

(At 6:25 p.m., a note was received from the jury.)

xxx

(Court's Exhibit 4 marked for identification.)

THE COURT: They want pages 249, 325, 608, 633, 1368, 1376 to 1379 read and page 163 read.

(Jury in box.)

THE COURT: All right. You have requested various

pages to be read.

(Record read.)

MR. BROWN: Judge, may I approach the side bar?

(At the side bar:)

MR. BROWN: Judge, on page 163, line 4, the question was withdrawn, and the question and the answer were not read to the jury. I believe that that question and answer should be read to the jury, even though the question was withdrawn.

THE COURT: Yes.

(Record read.)

(At 6:50 p.m., the jury left the courtroom to resume deliberating upon a verdict.)

(At 7:30 p.m.:)

(Jury in box.)

THE COURT: Ladies and gentlemen, you have been deliberating now for about seven and a half hours, and it is time for your dinner, and so I am going to have the marshals take you to dinner and from there to where you will be for the night, and you can resume your deliberations tomorrow morning at nine o'clock

JUROR NO. 8: Sir, are we allowed to make a phone call or not?

THE COURT: Yes. The marshal will take care of all that. You will be allowed to call. I think you can make

individual calls, but the marshal will take care of it. He will get in touch with your families and so forth.

I am talking to the marshal now: can you lock up the jury room? The jury have a lot of notes and things like that. Are you going to be able to lock the room up?

THE MARSHAL: Yes, sir.

THE COURT: Lock the room up with the exhibits, so they won't have to take the exhibits.

Take the jurors to dinner and then to the hotel and arrange forthwith for their phone calls.

(The jury left the courtroom.)

MR. ALCH: Your Honor, tomorrow morning I am scheduled to appear for a sentencing at nine-thirty before Judge Reilly in the Bronx Supreme Court. Would it be all right if I attended to that and asked Mr. Brown to cover for me?

THE COURT: If it is all right with Mr. Madonna and it is all right with you, fine.

MR. ALCH: It's okay with me, your Honor.

THE COURT: All right. We will adjourn now.

(Adjourned to November 16, 1976, at 9:00 a.m.)

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UNITED STATES OF AMERICA

vs.

76 Crim 846

MATTHEW MADONNA et al.,

Defendants.

New York, N. Y.

November 16, 1976 - 9:00 a.m.

(Trial continued.)

(At 9:30 a.m., a note was received from the jury.)

THE COURT: The jury has reached a verdict. What time will Mr. Alch be back?

MR. BLOSSNER: I imagine he will be back by ten-thirty, your Honor.

THE COURT: I don't think I want to take the verdict in his absence.

MR. FLANNERY: Your Honor, the defendant has counsel present. If it is in anticipation of possible motions in the event of a guilty verdict, perhaps we could take the verdict and hold those motions in abeyance until Mr. Alch arrives, if that is your concern.

THE COURT: Well, I am concerned about that. I have no idea, obviously, what the verdict is.

MR. FLANNERY: Nor do I, your Honor.

THE COURT: It is my practice not to open the

envelope. I want to hear it from the jury.

MR. FLANNERY: Mr. Madonna, too, I recall, indicated that Mr. Blossner would be satisfactory in his representation, unless the defendant has perhaps changed his mind, in which case I think that the proposal I made --

MR. BLOSSNER: If your Honor please, our client is prepared to take the verdict.

THE COURT: All right. We will do that. Bring in the jury. You can hand that to the forelady.

I gather, Mr. Madonna, that you are willing to take the verdict now, in Mr. Alch's absence?

DEFENDANT MADONNA: I am, your Honor.

(Jury in box.)

(The roll of the jurors was called. All answered present.)

THE CLERK: Madam forelady, has the jury agreed upon a vardict?

THE FORELADY: Yes; we did.

THE CLERK: Would you open the envelope?

THE CLERK: How do you find the defendant Madonna as to Count --

THE COURT: Let her read the verdict.

THE FORELADY: On Count 1, we find Matthew Madonna, Salvatore Larca and Richard Klinger guilty. On Count 2, we

find Matthew Madonna and Salvatore Larca guilty.

THE COURT: Poll the jury.

(Each member of the jury, upon being asked if the verdict as recorded was his or her verdict, answered affirmatively.)

THE CLERK: And so say you all.

The jury is polled, your Honor.

THE COURT: All right, ladies and gentlemen. Many thanks for your services, which are over now. I want to thank you for your efforts and for your attention during the course of the trial. I recognize that it has been some sacrifice for each of you to sit on the jury, but I think it is the essence of our system, and I hope that your service here will indicate to you how important it is for busy people like you to sit on a jury as well as those who have the time.

Thank you. You may be excused. I think you have served your two weeks, and you can just go home.

JUROR NO. 3: How about the notes over there?

THE COURT: Your notes are your own. You may have them. I will ask the marshal to get the exhibits from the jury room.

JUROR NO. 4: They are right here.

THE FORELADY: Do we report downstairs?

THE COURT: I don't think so. What do they do?

THE CLERK: If they have completed their two weeks, they just go home. If they would like to report back downstairs --

THE COURT: There is no need for them to report there if they don't have to.

(The jury left the courtroom.)

THE COURT: What is your pleasure, gentlemen, on motions?

MR. FLANNERY: Well, your Honor, I would make an application to remand all three defendants. If you want argument, I would specifically direct my arguments to each of the defendants involved.

THE COURT: Well, aren't we going to wait for Mr. Alch?

MR. BLOSSNER: I would ask that we wait for Mr. Alch.

THE COURT: In that event, the three defendants will be put in custody for that period of time.

MR. BROWN: May we make our applications?

THE COURT: Do you want to make yours and not wait for Mr. Alch? I would prefer to hear all of them at ten-thirty.

Is there a marshal present?

THE COURT: We will keep them here, Judge. We

won't leave the courtroom.

MR. FLANNERY: Your Honor, I would like to have a marshal present.

THE COURT: We have had no problems with them, and I can certainly vouch for my client.

MR. FLANNERY: Well, he hadn't been found guilty prior to this, your Honor.

THE COURT: I know, and I am going to see what we can do about that. This is only going to be until Mr. Alch arrives. After I hear argument, I will make up my mind about your motions and whatever other motions the Government is ging to make, but I think, Mr. Brown, that I would prefer that they be in custody until I hear whether there is any purpose to be served in the Government's argument.

MR. BLOSSNER: Your Honor, may I suggest that we at least be restricted to the courtroom? We are talking about approximately a half hour. If the Court has no objection, perhaps they can be restricted to the courtroom.

THE COURT: I have a matter pending that I have to hear soon. After that, I am going up to chambers. What I would prefer is to have them in custody, while the other matter is being heard, which will leave you and other counsel free to do whatever you want to do until ten-thirty.

MR. BROWN: May we confer with them? If they are

in custody --

THE COURT: Where is the marshal?

THE CLERK: He is taking the jury out of the jury room.

(The marshal entered the courtroom.)

THE COURT: Mr. Marshal, I want you to keep these defendants in your custody until Mr. Alch arrives. Their counsel want to confer with them. You can make arrangements with them as far as that is concerned, but they are in your custody.

MR. BROWN: Could I recommend, if the marshal finds it acceptable, that we go into the jury room?

THE COURT: If that is agreeable to you.

THE MARSHAL: That is agreeable, your Honor.

THE COURT: Than if it is agreeable to you, it is agreeable to me.

THE MARSHAL: May I ask how long it will take, approximately?

THE COURT: Well, what we are waiting for is Mr. Alch's arrival. He is Mr. Mad[illegible] counsel, and we expect him at ten-thirty, approximately. It could be earlier or late

All right. Let me know when Mr. Alch arrives, and we can adjourn until ten thirty.

(Recess, during which another matter was heard.)

MR. FLANNERY: May I proceed, your Honor?

THE COURT: I gather the defendants have some motions as well. I don't care in what order they are heard.

MR. FLANNERY: The Government's application is to remand all three defendants, and I was in the process of making that application when your Honor recessed.

I will address myself individually, starting with Mr. Madonna, although some of the remarks I make with respect to him obviously will apply to the other two defendants.

Mr. Madonna, at the outset, has resources the character of which should be noted. He has vast accumulations of wealth but no visible means of support. There has been reference made to a Martin Technology at the time of his arrest. That is a business which has never had any income. Lentini Enterprises was listed as one of his businesses on a passport application. However, he is no longer associated with such a business, and that was a losing business.

The Court is well aware of the fact that he has represented himself to be a travel consultant, and during the course of the trial pictures were produced showing that the address for that enterprise is a bogus address, and the phone number he made available at the time of his arrest is that of an answering service, which leads one to no address whatever.

Mr. Madonna during the course of the trial has been shown to be the owner of a Citroen, which at the time of his arrest was worth $6,000, and a Pontiac car worth $6,700. When he was arrested, he had cash on his person far in excess of what an ordinary person carries: $2,300, and there is testimony throughout the case of how these people freely spent money.

Mr. Madonna also is directly related to a significant seizure of money which he moved across this country by two couriers in 1973, and these two couriers met Mr. Madonna in the San Francisco area. The amount of money was $260,000. A lot of informants advised the Government such money was coming across the country, and such money was organized crime money.

Mr. Madonna opened a valise in San Francisco providing the money to these two couriers and placed the money in two banks in San Francisco. The money was to be used to fund the New Hebrides Corporation and, further, Martin Technologies, which is a shell that never had any income during the course of its existence.

Those are the resources available to a man who owns three homes in addition to all the other things I mentioned and who has no visible means of support.

The Government submits that the means Mr. Madonna

has to support himself is the narcotics traffic. The Government has reliable information that Mr. Madonna is one of the suppliers for Mickey Barnes, one of the largest narcotic dealers in the nation.

Turning to what else has been evinced during the course of the trial, which I have directed the Court's attention to, there was testimony about a passport application, which constitutes a crime in and of itself, the fact that in connection with that he would represent himself to be another person.

There has been testimony, as I have already referred to, as to phony identification. There are lies -- which the jury must have concluded were lies -- by Kenneth, Ralph and Vera Battista and Ben Larca during the course of this trial.

The Government has information to it, that it is willing to present at a hearing, that Ralph Battista, following Joe Boriello's arrest, before Joe Boriello cooperated, was negotiating for recovering that heroin which was left behind, the excess in Bangkok, Thailand. There was testimony during the course of the trial that once Mr. Boriello cooperated with the Government, arrangements were made so that Mr. Chai in Bangkok was led to believe that at another time it would be picked up, and that was part of the continuing

investigation that the Court was forced to educe on examination as to whether or not Mr. Boriello was some kind of hired gun.

They continued to conduct their narcotics traffic, and this has been attempted to be concealed by lies by Mr. Madonna at the time of his arrest, a lie in my office in the presence of Agent Kieran Kobell, this alibi involving a Joy who was never produced, an affair that he had had, perhaps, and then, on top of all this, what they are willing to do and what they apparently have done, as your Honor is well aware as a result of testimony at the hearing before this trial is the disappearance of Leslie.

The Government represents that it has made no arrangement with Mr. Boriello with respect to Leslie as far as any prosecution is concerned. In fact, the Government represents at this time that, based on the information available to it, it does not conclude that she was a part of the conspiracy, and the only reason that Mr. Boriello was so concerned is that she has apparently been kidnapped by the defense, and her whereabouts to this day are unknown, and we have as evidence of the fact that she has been kidnapped the testimony of Hirschhorn at the hearing as well as Joe Boriello in the hearsay statements he testified to, that both his brother Kenneth and Ralph Battista appeared at this trial

and lied.

I also direct your attention to the testimony of Travers and Florio during the course of the trial, in which they said the people were willing to provide $100,000 for bail and flight "and keep your mouth shut".

I don't think I have to belabor the fact that Mr. Madonna has a 1954 homicide, a brother who has been a fugitive since 1969, and there are reports by other agencies that his brother was at the time of his activity in the New York area a 'kingpin" of the Harlem drug traffic, and it appears that the younger brother merely stepped into his shoes and took over when his brother left.

The concluding thing that I would bring to the Court's attention is that under Title 18, Section 3148, the Court may remand in those situations where it has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community.

The Government submits that under the given circumstances before the Court, Matthew Madonna is not a person who will be assured of appearing in this court by any conditions that would normally apply. His narcotics traffic is one that poses a danger to the community, and in view of the evidence about Leslie and the concern of both the people who testified

at this trial as to their own well being, and then the testimony even on the tape, freely discussing the use of a gun and how the people would hit this and that other person during the course of the conspiracy -- the Government submits that is an indication that there is not only a danger to the community in general as a result of the nature of this crime in itself but to the persons in particular.

I have nothing further to add to that, your Honor.

THE COURT: Prior to the trial, Mr. Madonna's then counsel surrendered his passports.

MR. FLANNERY: He surrendered the passports of his family. We have no passports in the name of de Robertis, and there is no way the Government can check to obtain information about what passports he may have obtained in other cities under other names.

THE COURT: I understand he turned his passport over to the Government.

MR. FLANNERY: I have his passport under his true name and those of his family under their true names.

THE COURT: All right.

MR. FLANNERY: Would you prefer that I speak as to the other defendants, or does the Court wish Mr. Madonna's counsel to reply?

THE COURT: I think you might as well deal with all

of them.

MR. FLANNERY: Certainly, your Honor.

With respect to the defendant Salvatore Larca, the fact that at the time of his arrest he told us he was unemployed since 1974, at which time he was employed as a florist, during the course of the trial his own brother contradicted him and claimed he worked in this pet store, for whatever reason that may have seemed helpful during the course of the trial.

Salvatore Larca is a man who apparently has some means. However, at the time of his arrest he claimed to be unemployed, to have no bank accounts, not owning a home and not owning any cars. Nevertheless, we have seen during the course of the evidance at the trial that he lices in quite a home, and he apparantly seams to control that home, that he has available to him a number of cars, that he, according to Boriello's testimony, which must have been believed by the jury, was directly observed handing some hundred-plus thousand dollars to Mr. Boriello and freely spending hundreds and fifties, as described not only by Boriello but corroborated by Travers and Florio during the course of their conversations with Mr. Boriello, testified to during this trial.

The added factors that I point to the Court's attention are those that I have already enumerated with respect

to Mr. Madonna: the fact that during the course of this conspiracy they seemed to have available to them not only these great resources in terms of money but the will to do whatever is necessary to preserve the integrity of their organization.

Mr. Larca and Mr. Madonna have for some time now avoided the situation they now find themselves in, that is, the situation where they have been found guilty by a jury of their peers, and I suggest to your Honor that the motivation that they hoped that these alibis and this perjured testimony would provide them with their freedom, their motivation to remain here, has now gone from their grasp.

Finally, with respect to Richard Klinger, his own admission on the tape, notwithstanding his ridiculous story about a Godfather, was serious when he spoke with knowledge of "Godfather" and knowledge of guns and knowledge of another trip that was going to be conducted, which, according to Mr. Boriello in conversations with Battista, was at least to recover that heroin which was left behind on the last trip.

Further, Mr. Boriello has made information available to the Government that Mr. Larca was so crazy about this thing that he was just going to bring in more and more and more heroin.

So, your Honor, I submit that when one considers, in the light of the testimony at the trial and some addition-

al information I have brought to the Court's attention, it is clear that all three men pose a danger of flight in the specific instance of these defendants, and, in view of the danger to the community that especially Mr. Madonna poses, that all three of the defendants should be remanded, your Honor.

THE COURT: All right. I will hear from defense counsel in whatever order you gentlemen wish.

MR. BROWN: May I speak first, your Honor, with your permission?

THE COURT: Yes.

MR. BROWN: If your Honor please, I have listened very carefully to Mr. Flannery, and I think it is clear that there is a distinction here that I don't want to emphasize to the disadvantage of anyone, but certainly on behalf of my client, may I just give the history of what I have on information and belief as to the conditions of bail and as to Mr. Larca's history in terms of the issues of danger to the community and flight.

I don't accept the testimony at this stage even, respectfully, as it has been enumerated by Mr. Flannery, but I must give it respect, and of course as to Mr. Larca it is patent from everyone's testimony he is certainly -- and I notice that from Mr. Flannery's remarks, while he said that

he included certain elements in his representation to Mr. Larca, he did not expand on that, and I think that is his own sense of responsibility which moved him to recount the matters as he did.

Now, Salvatore Lara, your Honor, was born April 17, 1944, in the Bronx. He now lives ten blocks from where he was born. He attended school there. He did not finish Christopher Columbis High School, but that was his high school. He married Mrs. Donna Larca, who is twenty-nine. He has two children, Salvatore Steven and Jennifer, and also William, seven, who is his brother-in-law, who has no other home, and also on those premises he has Mrs. Musinello, his mother-in-law, who owns that home.

Now, his mother, Josephine, and his father, Fred, are both retired. They live at 2511 Cruger Avenue, in the same neighborhood, the same roots.

Of course, he has been on a pre-trial program, the conditions of which have required him to report every day and call in by phone on Sunday, and we have asked that they presen a record to see if there has been faithful adherence to the rule as laid down by the Judge.

Now, as to income, I tell you on information and belief and conversations with his both brothers, Benjamin and Fred, that they do operate the Bronx Pet Store at 769

Morris Avenue, that he is a partner there, that he does draw a salary from that, and as to the distinction between being a florist and a pet shop employee, what he indicated there was that he had been in the florist business and was no longer there but worked in a pet shop.

With respect to the probability of flight, there is the deep-rooted situation with respect to Mr. Larca, and, further, there are the conditions of bail, and on information and belief I tell your Honor that in five days of Nebbia hearings, there was no serious attack based on the probability of Mr. Larca not making an appearance, but this was the fashion in which bail was posted on August 25th, your Honor, and I think that the manner of posting and the persons from whom it comes are very important considerations.

First of all, Nicolina and Lennie Battista, their house in the Bronx, worth approximately $35,000, and their bankbook, showing a balance of approximately $5,000.

Bennie, the brother, put up a bankbook from the First National, showing a balance of approximately $4,200. Fred, $1,163.

The house at 2215 Delanoy, which is in Mrs. Musinello's name, is included in this. A brother-in-law, David, put up $10,000, There was put together $1,000 withdrawn, three from Donna's father, three from the sister and

three from the brother-in-law, for a total of $10,00
These people live in Pearl River, New York.

Now, if your Honor please, that is $100,000, which cannot conceivably be rooted in any nefarious traffic. This is money from the homes of people all of whom were related, and I would start from $,163 that Fred put up and go on to what Nichola and Lennie put up, with approximately $70,000 from their own acquisitions.

Now, I can only say on information and belief, your Honor, by interrogating members of the family and friends, that these are people who work for a living and who put up what they worked all their lives for. This established, I believe, the roots in the community which would indicate that if this man were to flee -- and I don't know about the great resources attributed to other persons -- but if he were to flee, these people would lose everything in life.

Now, there is a question of family pride and a question of family allegance here, and I submit to you that I certainly don't want to become saccharine, and I know that your Honor would be objective if I seem subjective, but this place in the Bronx which has been described in many ways and of which your Honor has seen photographs, appears to be a house worth -- I think they are accredited with over $50,000; but it is a place where people live, where a three-

year-old Jennifer lives. I can attest to that personally. I can attest to the household, and I don't want to be in a position of testifying, but I have personally visited and personally seen that the roots are there.

For this man to flee prior to sentence, your Honor, would be to violate every tenet that has been ascribed to him. He is the same human being, still a human being, regardless of what the facts are on which the jury found him guilty in their hearts.

To allow him to remain out on the same conditions as before -- I think the rule talks about danger to people. Now, I recall the testimony of Mr. Boriello. I don't know whether it was the kind of talk that is meant to impress people about "She was late and I told my people she would get hurt." I choose to believe -- and I know your Honor heard it, whatever -- but Sal Larca has never been put in the position of being that kind of person.

He does have a Corvette, and there are two other cars -- no question about it. One car certainly has some value. I think it is a Cadillac. No question about that. They are in Donna's name, and I can accept whatever subterfuge occurs to the Government about that; but I cannot accept the premise of a man whose roots are there, whose family is there, whose every dime that has been put up to hold him out

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has come from a scuffling of getting together family members who put up from $1,163 to the Islip home and all the others who have put up their money.

I don't believe there is any evidence as to any violent nature of this man as threatening the community, and as far as any other involvement with the kind of reporting he does, with the kind of observation he is subject to, I think that in terms of humanity and a decent concern for his family -- and I am not being maudlin, Judge, but in the starting of the VERA project, this is the situation that was talked about in our communities.

I would also submit to your known that I know and I realize it takes some privilege -- I know your experience about people. I have sat next to Sal Larca throughout this trial and watched him. I think that the very fact that there has never been a waiver from response to this Court, whether in the hallway, here, no matter where. I think your Honor has watched him. I know we are right in your line of vision, and I think that that is a part of the evaluation of Sal Larca.

I think he has to be regarded as an individual: Salvatore Larca. I think he has to be seen as one man, standing here, with a family and with those very deep-rooted tentacles in the soil of the Bronx and of Manhattan -- and

I don't want to extol the Bronx -- God knows that that is not the point -- but he hasn't moved ten blocks away. He's been around.

He had a problem in '73. He was acquitted there. He never ran.

I think that one of the things that is clear here is that even though there was the admonition from Mr. Boriello, and if we refer to matters that are outside this courtroom, your Honor is aware of the fact that he was told, "Look: you better run; you better go."

Now, I realize that that has its negative as well as its positive side, but I petition the Court to recognize that Sal Larca, whatever the crime of which he stands convicted, is an absolutely indigenous person, who has never had a passport. I don't know about any knowledge the Government may have that he travels about the country. I must confess to you that I have no personal information about that, and I wouldn't be able to divulge it if I did, but I feel this man belongs in the Bronx, lives in the Bronx, where he has to live and die, whatever the circumstances, within the pattern of his life, and I petition your Honor to allow him to remain at liberty pending santanca.

THE COURT: Mr. Alch?

MR. ALCH: May it please the Court, I think that

most of that which Mr. Flannery has told your Honor is really not relevant to the criteria set forth by the statute pertaining to bail pending sentencing.

The fact that witnesses were not believed by a jury does not ipso facto make them perjurers.

I think it is most significant, your Honor, that in the 3500 material, your Honor, that we have received, especially when co-defendants were pleading guilty before your Honor, there were representations made by Mr. Flannery that the proceedings be sealed because of a threat to the safety of these individuals. That has been bandied about throughout the pre-trial proceedings, and I challenge the Government at this time or at any other hearing to show any threats to any individual since this indictment came down, by my client.

There have also been representations made to your Honor -- and this is a matter of record on 3500 material -- that the trial would not come off, because my client would flee. Well, when the trial actually commenced, I received word that many associates or many members of the United States Attorney's staff expressed surprise at the fact that Mr. Madonna showed up for trial.

Mr. Madonna was under -- in my experience, in any event -- the strictest bail provisions that I have ever come across. Aside from the amount of money involved. as your

Honor well knows, he was restricted to the Bronx area and Manhattan, and I can assure your Honor, without having proof at hand, but just based upon the attitude of the Government, that Mr. Madonna was surveilled undoubtedly from morning to night.

MR. FLANNERY: That is incorrect, your Honor.

MR. ALCH: It would be completely inconsistent with the attitude of the Government if they did not.

He has had to report personally five days a week at ten o'clock in the morning -- six days a week -- I am sorry -- which he has done, and phone in on the seventh day. There is a gentleman in this courtroom, if your Honor would care to hear from him, from Pre-trial Services, who would readily attest to the fact that all of these most rigid conditions were adhered to by Mr. Madonna.

Your Honor is very well aware of the very close scrutiny given in the Nebbia hearings to the source of the bail put up, totaling $250,000. Just briefly, your Honor, there is a $200,000 surety bond, secured by a three-family home owned by the defendant. There is a family home, also, the property of Mr. Thomas Campi and his wife, cousins. Mr. Campi is a Professor of English. There are bankbooks, one in the amount of $8,000, of Anthony Cantorelli, a friend of the defendant, and by Frank Parker, a $25,000 bankbook, a

restauranteur, who is also a friend of the defendant.

There is a cash deposit from Mrs. Camille Bailey from the estate of her husband in the amount of $7,100, and the $50,000 personal recognizance bond is secured by the family home of his wife, Jean, and by Mr. Thomas Ronger, who is the owner of PMC Catering.

Also, your Honor, I would respectfully call to your Honor's attention the fact that any references to Leslie are completely unsubstantiated as far as any alleged actions on behalf of Mr. Madonna are concerned. The way I read the statute, the criteria for bail pending sentencing are identical to those applicable to bail at the time of indictment, with one addition factor, and that is danger to the community or to others, and I submit to your Honor that under the rigid bail restrictions Mr. Madonna has gone through and observed since the time of this indictment and with all representations made to your Honor by the Government, both that he would flee -- which was not the case -- and that harm would come to potential Government witnesses -- which did not happen.

He has adhered strictly to the restrictions, as could be testified to by the Pre-trial Services.

I would suggest to your Honor that there exist issues which will be taken up on appeal, and I say this most respectfully to your Honor, that I can honestly, as an officer

of the Court, represent to be non-frivolous.

As your Honor knows, there were many, many exceptions taken -- and I say this again most respectfully -- with regard to the admission of the prior similar act.

THE COURT: You need not be that diffident, Mr. Alch. I recognize the fact that you disagreed with a number of my rulings, and you had every right to do so, and you have every right to take it up with the Court of Appeals. You need not apologize for that.

MR. ALCH: Thank you, your Honor.

Your Honor is well aware of the rulings with which we took issue. I merely mean to point out to your Honor that these are non-frivolous issues, at least in my opinion, and this appeal will not be dilatory nor will it be based on frivolous grounds.

My client's daughter is seven years old, and she is hyperkinetic, closely attached to her father, and I fear that a sudden departure, without any preparation, should the worst happen and the appeal be denied, would result in grave damage to his daughter.

Mr. Madonna will abide by not only the strict conditions under which he has been since the indictment was promulgated but any other conditions your Honor may wish to impose.

If this man were going to flee, the Government can't have it both ways: if they say that he had the financial resources and access to passports or other means of flight, based upon their representations of their anticipation that he would not show up for trial, I suggest if he was ever going to flee he would have fled before this trial began. But, to the contrary, your Honor, he has been at the pretrial proceedings; he has been at court every time he was supposed to be. He has rigidly adhered to the boundaries with regard to Manhattan and Bronx Counties.

Mr. Madonna has an eighty-two-year-old father, who by the efforts of my client has not been told of these proceadings. Naturally, he would have to be told now. But I ask your Honor to have some mercy, to allow my client not only to attend to his seven-year-old ill child but be able to break this news to his eighty-two-year-old father.

As I say, I am not the oldest lawyer who will ever appear before you, Judge, but I have been around a while. I have never seen stricter bail conditions than those which my client has so faithfully adhered to, and I assure your Honor, based upon my knowledge of him and as an officer of the Court, that if allowed to remain under present conditions or if your Honor should deem it appropriate to make them even more strict, this man will not violate any of these

restrictions.

I can also tell your Honor that counsel on his behalf, myself included, will proceed with all post-trial motions, appellate procedures, with as much dispatch as possible. We will not be dilatory.

And I ask your Honor to recognize that there has to be some slight recognition -- it can't be all as the Government paints it. There are criteria which I submit the Government has greatly ignored, and given your Honor's surplusage with regard to its allegations, I ask your Honor for mercy. Let this man remain at liberty until sentencing, at which time, should your Honor have allowed him to remain at liberty, we will ask your Honor to allow him to remain on bail pending appeal. But taking first things first, I ask your Honor to keep him on these strict conditions or any other conditions that you may deem appropriate.

THE COURT: All right. Mr. Lippel.

MR. LIPPEL: If your Honor please, in Mr. Flannery's remarks I heard nothing with respect to Richard Klingar that would militate against continuing the bail conditions as they presently have been. The present bail is a $25,000 personal recognizance bond, secured by $2,500 cash and the deed to his house.

Your Honor, this represents virtually everything

Mr. Klinger owns in the world. He has no funds remaining. As has been brought out in the trial, he is on a leave of absence from his job. He has no current income.

However, your Honor also heard the testimony as to his background, his roots. I am not going to belabor the point other than to point out that he has been working at the same job for eight years, as a salesman for Van Waters, a chemical company in the Los Angeles area. He has been living in the house which he owns, with his wife and his young son, who is seven years old.

Judge, to impose any stricter bail conditions or to remand him without bail, in view of the fact that there has been nothing pointed out by Mr. Flannery that indicates flight or danger to the community on the part of Mr. Klinger, I think it would be at this point rather harsh.

Your Honor has seen him appear here for arraignment, where he went to great expense just to fly in for the purposes of that arraignment and fly back and then return to this Court for trial.

He has appeared when called upon and when directed. He also is under the supervision of Pre-trial Services. However, that is in California.

My information from Mr. Klinger and Mrs. Klinger is that he has reported to Pre-trial Services regularly, and

he has abided by all their rules and regulations.

I submit that the bail as it is presently constituted, representing everything Mr. Klinger has in the world, should be sufficient pending the sentence, and I would ask the Court to continue that bail.

MR. FLANNERY: Your Honor, if I may address myself to some of the remarks, Frank Madonna had the same tentacles in the community that were referred to when he decided to run, and it was stated that if Matthew Madonna was ever going to flee, he would have done it by now.

Well, if he was ever going to flee, he would flee now, after he has been convicted, because up until this time he was willing to do whatever he thought was necessary, and the appearance of these defendants at Pre-trial Services represented not their respect for the judicial process but their arrogance with regard to it, their arrogance that by lies and perjured testimony they could avoid the fate that they have met today, that is, their conviction.

What factors should be considered in referring to bail under the present circumstances? His employment? He has none. His financial resources? Unlimited. His character and mental condition? I referred to what they were willing to do during the conspiracy, and the reference to a gun was made not only in Bangkok but it was made by Mr. Klinger on a

tape as to what would happen to Mr. Joe Boriello if he didn't watch his step. His record of convictions: breaking a man's leg and shooting him in the head. That is the murder conviction.

Whatever has been said to the effect that we can trust him to return, based on the things that have already been said, we can't trust him to return. Certainly, money was put up before; but who put that money up. Not Matthew Madonna.

There is evidence of the fact that Matthew Madonna had these cars, had these homes and had at least $240,000, in connection with which the Government has explained the means by which it was transported across this country, not to mention the amount of money that changed hands during the course of this conspiracy.

Those people who would suffer whatever loss would be involved could easily be recompensed by Matthew Madonna. One kilo of heroin in this case would pay for all the money that Larca's friends put up in this case.

THE COURT: Mr. Madonna had a prior conviction?

MR. FLANNERY: Yes. Murder, in 1954.

MR. ALCH: That is not quite correct, your Honor. It stands as manslaughter.

THE COURT: How about Mr. Larca?

MR. FLANNERY: No. He has no prior convictions.

Mr. Klinger has had prior misdemeanors for marijuana and for a black box.

MR. LIPPEL: No, your Honor. Just the black box.

THE COURT: What is that?

MR. FLANNERY: It's a device use to trick the telephone.

MR. LIPPEL: It's a device placed on the telephone to affect the rates. It was on his personal phone in his house. There was no other conviction, to my knowledge. There was one arrest and some marijuana was involved in that, but there was a plea of guilty, and he was placed on probation.

THE COURT: All right.

MR. ALCH: Your Honor, I am sorry --

THE COURT: Well, I will hear you. I am going to hear the other motions as well, whatever motions you have.

I want to think about this problem for a while, but I will hear you.

MR. ALCH: I will be very brief, your Honor.

Your Honor, I will tell you the truth: if I closed my eyes, I would think I would be hearing a sentencing proceeding ratherthan a motion on the part of the Government to remand.

THE COURT: You would be hearing what?

MR. ALCH: If I closed my eyes, I would think I was at a sentencing, where the Government was asking your Honor to impose the maximum panalties that the law permitted to be imposed.

Surely, there must be room or there must be a method to draw the line at which the aggressiveness -- put it that way, giving it the mildest interpretation -- of the Government regarding a man who has been convicted must stop. There must be room for compassion, and we look for that.

THE COURT: That is entirely true, but everyone has emphasized the danger to the community in terms of violence and also a continuation of the drug traffic.

MR. ALCH: Your Honor, he was eighteen years old when that manslaughter thing occurred. He has served his time. He has paid for that.

THE COURT: The narcotics traffic is a very dirty business, and there is so much danger to the community, in my judgment, in dealing in this dirty business, and to allow these men to continue to be free to deal with it, which is something I have to think about -- I don't believe that I can treat this matter as some ordinary infraction of the law. What was involved in these transactions was a staggering amount of contraband. I don't know that much about it, but

it certainly involved, by the time it reached the streets, multi-millions of dollars, twenty, forty million dollars, perhaps, of this poison, and that is the issue.

I am going to have to give some thought to this. I am not prepared to make any hasty decision about it. I think I need to reflect on it.

Certainly, each of the individuals has to be considered in this category separately. Although Mr. Flannery has lumped them together, I wonder whether you can lump Mr. Klinger, Mr. Madonna and Mr. Larca together. The evidence in the trial at least would appear to indicate that Mr. Klinger can't be lumped with the others.

MR. FLANNERY: Your Honor, there is one --

THE COURT: Mr. Larca and Mr. Madonna have certainly met all of the conditions that have been required of them, but speaking of Mr. Madonna now, he has now been convicted, and therefore a new dimension has been added that I have to consider, but whatever I decide to do, I do feel that I am going to have to do it on an individual basis.

Naturally, there is a wide gap between Mr. Madonna and Mr. Larca as far as the testimony is concerned, and Mr. Klinger, and I think I have to start with that. There is a wide gap between them.

MR. FLANNERY: Your Honor, there is one matter

with respect to Mr. Larca, which I refrained for certain purposes from stating before, but I think it is necessary to state it when considering what to do with Mr. Larca, with respect to threats.

There was, during the course of the trial, a discussion in the lunchroom in this building, overheard by a person who happened to be there, who was not an agent of the Government but who happened to work in the office of the U. S. Attorney. Present at that discussion were members of Mr. Larca's family. They were discussion what they would do if they lost this trial.

One person repeatedly referred to the assistant responsible for the case by name, and it was Sal Larca's younger brother, and he said during that discussion, "I would like to kill him", referring to Mr. Flannery.

Now, I offer that only in a descriptive manner, your Honor, and I suggest that that will be the subject of further inquiry.

MR. BROWN: Judge, I don't know about that. I can think of many family members who might say something like that under such circumstances. It is irresponsible, I have to say, but with the vigor with which Mr. Flannery moves, sometimes I felt the same way, although I never expressed it, and I would be honored if he thought the same way about me.

But good Lord, your Honor --

THE COURT: I think that is passion that is more or less understandable, and I think I can well disregard that. As a matter of fact, I can't consider that of any weight in my determination, in any event, because if I did, I would have to have a full-fledged hearing on that, which I am not going to do now.

I don't want to hold you gentlemen up. You have been here for two days. But I think that this is a matter in which there is a very heavy burden --

MR. BROWN: Judge, I will stay all afternoon if it is necessary.

THE COURT: I would prefer first that we have lunch and perhaps come back at two o'clock, and I will announce my decision.

Now, there are several matters here that I think we ought to get straightened out. I have this newspaper article which I think Mr. Alch wanted made a court record.

MR. ALCH: Yes, your Honor.

THE COURT: Will you mark this.

(Court's Exhibit 7 marked for identification.)

THE COURT: There were also several matters which I don't think go into the record. We are going to have to correct the record in connection with the redacted material

that was to be made an exhibit and sealed for appeal purposes.

MR. FLANNERY: That's correct.

THE COURT: I think there were about three matters of this kind open.

MR. FLANNERY: I think that's correct, your Honor.

THE COURT: I was checking with my deputy clerk, and I gather that only one of them has actually been taken care of.

MR. FLANNERY: I have it either here or in my office. I will make sure to take care of that.

THE COURT: Have the original and the redacted material presented to me in both of those instances, and it is to be sealed and made a part of the record for the purposes of appeal.

In the event that I decide not to remand without bail, do you want to -- I am sure you are going to ask for bail in excess of that which has already been put up, but do you want to defer that until later?

MR. FLANNERY: Certainly, your Honor.

THE COURT: All right. We will resume at two o'clock.

MR. FLANNERY: Your Honor, they will remain in custody?

MR. BROWN: Can we bring them lunch?

MR. FLANNERY: I think the marshals provide them with lunch.

THE COURT: Yes; they will remain in custody until two o'clock.

MR. BROWN: May we have it under the same conditions as yesterday?

MR. BLOSSNER: Your Honor, it is so close to the lunch hour, I think it would be better if the marshals brought them lunch.

THE COURT: Whatever is agreeable to the marshals is agreeable to me.

All right.

(A luncheon recess was taken.)

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AFTERNOON SESSION

2:00 p.m.

MR. FLANNERY: Your Honor, if it is necessary, I went over during the lunch break to obtain recent cases in which a remand is involved.

THE COURT: It comes too late, Mr. Flannery. I have made up my mind, and I will set forth my reasons for the decision.

One of the decisions was more difficult. Two were not.

As all of you know, of course at the present time there is no bail as of right. It is within the discretion of the Judge. All of the defendants were found guilty of conspiracy to violate the Federal narcotics laws pertaining to the importation and distribution of heroin.

I emphasize -- not necessarily to take away from what I regard as essential objectivity -- I do regard heroin as one of the most lethal and debilitating of narcotics, and if the scheme had worked, a vast amount of poison and destruction would have been unleashed on the country.

It is clear to me from the evidence in the case -- not from any evidence outside the record -- that what these men were involved in was an enterprise which posed a public danger, and I am therefore obliged to determine whether I can

impose any conditions of release which would insure against those dangers and could insure against flight.

Now, the profit to be gained from trafficking in these narcotics is staggering. The evidence disclosed -- it is not evidence, of course, which the jury could have used to convict, but we can certainly take it into account in making this determination -- that in 1972 Mr. Madonna and Mr. Larca were dealing as partners in heroin distribution. The evidence also is clear that Mr. Madonna has ample resources, that he was able in this case to hire detectives, send them to Florida, bring up Florida witnesses, all to relate to the Court and jury a transparent and ingenuous alibi.

Also, Mr. Madonna operates under an alias and hence has the means to use an alias and abscond.

I am satisfied that Madonna and Larca are partners in a continuing heroin enterprise, and even though what they were tried for was a botched effort, there is no evidence that that partnership is dead, and therefore Mr. Madonna's release would pose a reasonable threat of further community contamination through the narcotics traffic and also poses a threat of flight. Therefore, he is remanded without bail.

Mr. Larca's case was the difficult one, because although he is a partner with Mr. Madonna, he has not used

any alias; he has not manufactured any personality, and he has not used any moneys to seek to perpetrate a fraud upon the Court and jury, to fabricate testimony.

Mr. Larca's involvement in the heroin traffic does pose a threat of community contamination, and I feel that the safest way to prevent that contamination is to deny his release on bail pending sentence.

As to Mr. Klinger, while his role is substantial, there is nothing in the record which would lead me to conclude that he has any continuing or substantial involvement on the basis of the evidence in the narcotics traffic. The evidence may more fairly be interpreted in this case as far as he is concerned as indicating a one-time involvement, at least to this extent, and I therefore do not feel that Mr. Klinger's release pending sentance poses any threat to the community or that there is a likelihood of flight.

I think Mr. Klinger is entitled to have bail, although I think the Government, by the same token, is entitled to seek a substantially increased bail over that which it had secured at the hearings before trial.

That concludes that matter.

MR. BROWN: If your Honor please, might I be heard just once more as to Mr. Larca?

THE COURT: Of course.

MR. BROWN: As to the two elements that are necessary, I think your Honor has stated them correctly: the threat of flight and of danger to the community, but I would ask if your Honor's fear of the propensity for flight could not be taken care of by increasing bail or increasing the reporting requirements to the Pre-trial Service.

I not your Honor made a substantial distinction betwean --

THE COURT: As I said, I had difficulty with one. That was Mr. Larca's situation.

MR. BROWN: I only ask --

THE COURT: It gave me pause. I had no problem with Mr. Madonna and Mr. Klingar.

MR. BROWN: I understood that one of the problems which besets your Honor is the second element, which is apparently missing. So while I do not intend to indulge in technicalities or the concept of the rule or argue that one without the other would necessarily change your Honor's mind, it does appear to me -- and I assume because you did not comment -- he does have deep roots, and there is an absolute lack of any activity on his part that points towards flight.

I would point out also that certainly he is not a full partner. If we would take the testimony in the case as your Honor has it, I think everyone testified that in a

sense the Boriello-Larca position is not that of Madonna, and that he is at the very least someone who is not in the same category, is not capable of producing a sustained effort which your Honor finds certainly important in the concept of continuing the deadly traffic, in connection with which I cannot differ with you. I want to make sure the Court understands that. I feel just as keenly about that.

But in terms of his position in what your Honor has determined to be a hierarchy, I would argue, if your Honor would entertain it, that in terms of the month or six weeks or whatever, in this case, there is not the capacity for continuing what has certainly been correctly described, and if true -- we still deny it -- this deadly traffic.

And so I would pray that your Honor might consider this argument in that light, because I note with your very careful reasoning you did not state that he presents a propensity for flight, and although I think this is possibly negative reasoning, in Mr. Flannery's very vigorous argument for the Government, even he has not pressed that. There has only been the one phrase that your Honor has set forth, the partnership concept; but I am certain, your Honor, accepting your logic, he is not an equal partner, not even a substantial partner, and he is a man who could be released without the danger to the community, which I believe is

endemic.

If the second element is missing and if substantial bail -- and we may not even be able to meet it -- I don't know -- but if substantial bail or an increase would satisfy the restriction requirements of Mr. Larca to function, I would ask your Honor to please reconsider that, and that is the only argument I can make.

If I accept the premise of partnership, it is not potent; it is not equal; it is in no way of equal status. He is no different, by Boriello's testimony, as I interpret it, from Boriello himself, and I am certain that under the conditions that surround Mr. Boriello at this time, there is a time when he, too, will receive the same consideration, but under the same rationale -- I realize he has cooperated with the Government -- it is only logical to say that of course he would not have the potential, but in this case until sentence, your Honor, which is quite different from a plea or bail pending appeal, I would urge your Honor to please consider that -- I hesitate to use the word "fairness", but wherever the equities lie in terms of his staying out for a month or whatever it is, they certainly hinge on his ability to press and conduct an operation, and I submit to your Honor that from the testimony before your Honor and, indeed, from the broad aspect of the Government's position, he does not

htat that potential.

Mr. Larca is not in the same category, and I argue that because I certainly have the strength of the position that Larca is a Bronx man, born and bred there, has never moved from there, has all of his roots there, has his family surrounding him, and if he moves in terms of continuing the traffic or moving, the result is destruction to his entire family, and I don't think that that is a risk that he in his lifetime has indicated he would bring on himself.

And so I plead with your Honor, for whatever restrictions you may deem appropriate to impose, give him this opportunity to have these four weeks to work pending his appeal. He is going to have to work with me.

He is not in the same category, I can assure you, Judge, and my status in this case will indicate that, and I hope your Honor will consider it in terms of restrictions or advanced bail -- perhaps he won't be able to make it, but I wish you would consider it.

During the trial I know you have observed him; I know you have heard the testimony, and Boriello himself -- I don't necessarily accept it, but I suppose in this argument I must -- Ralph Battista, Ben Larca and Boriello, and certainly they are not of the strip who could continue the traffic.

I agree wholeheartedly what it is all about, but I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	NOTICE OF MOTION TO DENY ADMISSION OF PRIOR CRIMINAL CONVICTION OF DEFENDANT TO IMPEACH HIS TESTIMONY
-against-	:	
MATTHEW MADONNA, et al.,	:	76 Cr. 846 (R.L.C.)
Defendants.	:	

S I R S :

PLEASE TAKE NOTICE that upon all the proceedings previously had herein and upon the attached memorandum of law, the undersigned attorneys for defendant, MATTHEW MADONNA, will move this Court before the Hon. ROBERT L. CARTER, at the United States Courthouse, Southern District of New York, Foley Square, at a term for motions designated by the Court, for an order:

1. Denying the admission of evidence whether by cross-examination of the defendant or by the production of public records tending to show that the defendant was in November 1954 in the New York State Supreme Court of New York County convicted of the offense of murder which conviction was later reduced at a coram nobis proceeding held in the Supreme Court, New York County to a conviction for manslaughter, on the ground that the admission of such evidence would not be relevant to the veracity of the defendant's testimony and would be unduly prejudicial.

2. For any such other relief as to this Honorable Court seems just and proper.

A 282

Dated: October 29, 1976
New York, New York.

TO: The Clerk
United States District Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York

Hon. Robert B. Fiske, Jr.
United States Attorney
Southern District of New York
1 St. Andrew's Plaza
New York, New York

GRAHAM HUGHES
40 Washington Square South
New York, N.Y. 10012
(212) 598-2565

GERALD ALCH
Penthouse, One Center Plaza
Boston, Massachusetts 02108
(617) 742-5566

ROBERT BLOSSNER
250 Broadway
New York, N.Y. 10007
(212) 571-0805

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	
-against-	:	76 Cr. 846 (R.L.C.)
MATTHEW MADONNA, et al.,	:	
Defendants.	:	

CERTIFICATE OF SERVICE

I, Graham Hughes, Esquire, of New York University School of Law, 40 Washington Square South, New York, New York, hereby certify that I have this day served copies of the following papers on the following individuals and in the following manner.

1. MOTION TO DENY ADMISSION OF PRIOR CRIMINAL CONVICTION OF DEFENDANT TO IMPEACH HIS TESTIMONY WITH ATTACHMENTS.

2. A SUPPORTING MEMORANDUM OF LAW.

by delivering in hand this 1st day of November, 1976 to:

The Office of the United States Attorney
for the Southern District of New York
1 St. Andrew's Plaza
New York, New York 10007

Graham Hughes

GRAHAM HUGHES
40 Washington Square South
New York, New York 10012
(212) 598-2565

DENIAL OF MOTION TO SUPPRESS EVIDENCE
OF MADONNA'S PRIOR CONVICTION

76 Cr. 846 (R.L.C.)

November 9, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Motion Denied as indicated on the record.

UNITED STATES OF AMERICA

SO ORDERED

-against-

MATTHEW MADONNA, et al.,

Defendants.

Robert L. Carter
U.S.D.J.

MOTION TO SUPPRESS EVIDENCE OF DEFENDANT'S PRIOR CONVICTION

U.S.D.Ct.
filed
Nov. 15, 1976
S.D. of N.Y.

GRAHAM HUGHES
40 Washington Square South
New York, N.Y. 10012
(212) 598-2565
Attorney for Defendant, Madonna

MICROFILM
Nov. 15, 1976

TO: Hon. Robert B. Fiske, Jr.
United States Attorney
Southern District of New York

Telephone conversation between Jan Portman and Richard Klinger on 8/20/76

S/A Meale- The following call is being placed by Jan Portman to Richard Klinger at telephone number 714-649-2507 on August 20, 1976 at approximately 10:05 P.M. Call is being witnessed by Special Agents Whelan, Meale, Aiu, and Porter.

Dialing

Operator - Operator

Portman - Yes this is room 1262.

Operator - Thank you.

Ringing

Unid. female - Hello

Portman - Hello, is Richard there?

Klinger - Hello.

Portman - Hello Richard Kling--Richard?

Klinger - Richard Klinger.

Portman - Yeah this is Jan Portman.

Klinger - Hey Jan Portman how ya doing?

Portman - Alright, how you doing?

Linda - Hi Jan.

Portman - Hi how are you Linda?

Linda - Okay.

Portman - Oh yeah, how's California?

Linda - Oh uh, sunny.

Portman - It's sunny, Laughs... I know I passed, I passed by there today on a plan but I couldn't say hello, I was too high.

Linda - Hmmm.

Portman - Listen uh, I just got into New York you know. I was hung up in Honolulu I was kind of sick with a cost. So uh, what I want to know is uh, has B riell' been trying to get in touch with me? I thought he might be worried or something.

Linda - Hmmm.

Portman - Cause I got hung up there for two days, you know.

Klinger - Oh in uh, whatchama call it?

Portman - In, huh?

Linda - Inaudible.

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Klinger - In Honolulu.

Portman - Yeah, in Honolulu. I stayed for two days because, like I - like I had a cyst.

Klinger - But uh...

Portman - Then my ... Huh?

Klinger - Everything went smooth, right?

Portman - What?

Klinger - Everything went smooth, right?

Portman - They what?

Klinger - Everything went smooth.

Portman - Yeah, everything went smooth, yeah.

Klinger - Okay, yeah, he hasn't called us cause he's been out of town also.

Portman - Oh, he's been out of town. I know I saw him in Bangkok.

Klinger - Right.

Portman - You see and that's the last time I saw him. So he, you know, expected me back here a certain date which was, you know, a couple days ago, But, you know, since I had this cyst I stayed at Honolulu cause I really was feeling like shit, so...

Klinger - Do you have his number to get in touch with him?

Portman - No, I don't have his number, that's why I'm calling you.

Klinger - Okay, right uh, Princess?

Linda - Uh, I don't have it right here.

Klinger - Where, where's the book?

Linda - It's in the other...laughs...it's in the middle room.

Klinger - Okay hang on, I'll get it.

Linda - Yeah, I just called Leslie's sister.

Portman - Yeah?

Linda - I was really worried. They hadn't, well we hadn't gotten back in touch with you and I was really worried about Leslie cause I hadn't heard from, or I was trying to call her.

Portman - Yeah, that's his old lady.

Linda - What?

Portman - That's his old lady?

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Linda - Yeah

Portman - Yeah, she went with him I know and their kid? Their kid who's there too? Doesn't he have a kid?

Linda - Yeah.

Portman - Yeah, that's what I thought. Yeah, because I didn't, you know, I get to see him too much because I was late getting.

Linda - They took Jenny?

Portman - Huh?

Linda - I didn't know, I called up her sister who really doesn't know much except she would know where, where about... so I figured it all out last night I think it would be the night before.

Portman - Uh, huh.

Linda - And uh, I don't know when, I didn't know when they were due back. I didn't know, I'd drop her a line...

Portman - Yes, you see I was talking to him in Bangkok this was maybe 5 days ago I think it was. But he had to leave the country now his visa was up. So uh, you know I had to stay there and get everything packed, you know what I mean? You know to bring it back in.

Klinger - Right.

Portman - So he split and...and you know I thought, you know he expected me back but since I stayed in Honolulu you know, I thought maybe he was trying to get in touch with me cause...

Klinger - So you're in New York now?

Portman - Yeah, I'm at the Sheraton where you know, he, he, told me you know, where I'm suppose to get in touch with him.

Klinger - Okay. His phone number is Area code 212...

Portman - Uh, huh.

Klinger - ...884...

Portman - Uh huh.

Klinger - 1249.

Portman - 1249. Okay, that's Boriello's number?

Klinger & Linda - Right. Yeah. (Simultaneously)

Portman - Okay, wait, 884-1249.

Klinger - Yeah.

Portman - O...

Klinger - 884-1249.

Portman - Right. Okay. Okay, listen, also, uh I don't know I just wanted to mention something like when he's split, like it was like 7:15 in the morning, you know.

Klinger - Yeah.

Portman - And uh, we were talking about you remember we were talking about the amount of money?

Klinger - Yeah.

Portman - And like I was a little pissed off because uh, you know everything went, since everything went smoothly and I know, you know, what's gonna become of this. You know what's gonna turn into as far as money wise. You know he mentioned a different price to me, what I was gonna get paid for doing this whole thing. So, you know, didn't you originally tell me it was like 10 for each thing?

Klinger - Uh, I don't know, you know, what he said. He was, he was pretty screwed up when he was here.

Portman - Yeah I know. He was pretty screwed up there in Bangkok too. He was really, really you know, out.

Klinger - But he won't do you wrong.

Portman - he won't do me wrong.

Klinger - No.

Portman - No.

Klinger - And he's probably gonna, you know uh, this could be done again one more time.

Portman - Okay, well are, are you gonna you know, be getting anything out of this, I hope?

Klinger - Uh, hopefully.

Portman - Hopefully...laughs

Klinger - Yeah, right.

Portman - Okay, so you are getting something out of this, good. Okay.

Klinger - Did you have a good time?

Portman - Huh?

Klinger - Did you have a good time?

Portman - Did I have a good time? No, I can't say I had a good time. Only in Bali.

Klinger - Oh.

Portman - It was, uh, beautiful but, uh, I don't know ...I booked at this travel agency and she put me up at these real ritzy places you know, and I don't know, you know I had all that money to spend you know. You know he gave me...

Portman(continued)-...he was pretty generous for the trip, you know flying first class and everything. But traveling alone just uh, you know, just is not that much fun.

Klinger - Yeah, right.

Portman - See I, I stuck to the Orient. I was all in the Orient. I didn't go through Europe like he wanted me to. Cause it didn't make much sense to me. I thought it was kinda stupid, you know, to take some trip and spend two days in Paris and two days in Amsterdam and you know, stuff like that. So it just didn't make any sense to me. And if anything had happened you know, it would have made, you know, a lot less sense. You know someone said well what kind of trip is this that you took...

Klinger - But everything's together, right.

Portman - Yeah, everything's together. I just you know, thought he might be worried that's all. That's why I called you.

Klinger - Okay, yeah, right. Get in touch, get in touch with him for sure, Jan. You want his address?

Portman - His address? Yeah, yeah that would help too because you know, cause the sooner the better that he uh, you know, the stuff's moved.

Klinger - Right. 3940 Blackstone Avenue.

Portman - Uh huh.

Klinger - Bronx, New York.

Portman - Okay.

Klinger - He said, Lindasays it's actually in Riv...Riverda...Riverdale?

Portman - Riverdale?

Klinger - You know where Riverdale is?

Portman - Riverdale. Well no, but I, I'm sure I can find out where Riversale is...

Klinger - Yeah we can get the phone number and get him. It'd be best to contact him by phone.

Portman - Yeah listen if you think uh, you know this, this is pretty good I mean I'm sure he'll do me solid with the money and everything.

Klinger - Right.

Portman - You know, do you think he's gonna plan to be doing these again you know?

Klinger - Uh, yeah.

Portman - Yeah. Okay.

Klinger - Just, you take your time you know, I'm sure he'll be impressed with ah, with uh uh, well you got through.

Portman - Right., yeah.

Portman - Oh, he didn't think I was going to?

Klinger - What?

Portman - He didn't think I was going to?

Klinger - Inaudible.

Portman - Huh?

Klinger - Hey.

Portman - Didn't he think I was going to? I said.

Klinger - No the, the reason I suggested you is cause you're cool.

Portman - Yeah right. I'm cool but there's a lot of ther stuff involved, you know.

Klinger - Right.

Portman - Professionalism.

Klinger - You got a mouth and you're professional, right?

Portman - Uh huh. Okay so do you know...like the people he works with, are they really, you know, up there. The people, you know, I know...

Klinger - Heavy duties.

Portman - They're real heavy duty.

Klinger - Heavies.

Portman - Real heavy duty. But you, do you know any of them personally? I mean, you know...

Klinger - ...chuckles...

Portman - Are they...huh?

Klinger - I, I don't know. Call him the Godfather.

Portman - The Godfather, you call him, but that's about it?

Klinger - Yeah.

Portman - Huh. But they're pre...they're really heavy duty?

Klinger - Yeah, I, I, you know, I...

Portman - Mafiosa? I mean...

Klinger - They're, they're the type of people, right. I wouldn't want to know too personally. You know what I mean?

Portman - You wouldn't want to know them to personally. Uh huh. Okay, I don't know what else to say. How's the kid?

Klinger - Oh, it's just beautiful.

Portman - Yeah. That's what I thought.

Klinger - Yeah, it's too bad you couldn't have stopped off...

Portman - Really, you know, you know my flight, you know, I, I flew into California and then from there I got a connecting flight to New York.

Klinger - Well you were rushing.

Portman - Yeah, I, well yeah, I wanted to get back here...laughs... you know I, I mean I can only make him wait so long. Okay, so, I don't know...

Klinger - What do you think your plans are for the future? Are you gonna go back to Miami?

Portman - Oh no. I'm not gonna go back to Miami. I want to know where I could get into the sound, you know the engineering business here. You know, get into some kind of uh, sound production or uh, you know...

Klinger - Right

Portman - You know. I wanna, you know, take the money and uh, do s...you know, legitimate. I really like to uh, you know, do something...

Klinger - Right.

Portman - ... good with it. Definitely.

Klinger - Hey, don't lose, lose touch with us, you know. Because uh, we haven't forgotten about you, you know.

Portman - Okay. No, no I, I, I, no, you know. Don't worry I'm not going to lose touch with you. But uh, I don't know. So I'm glad everything went okay. Do you know if uh, uh, his other fr..you know uh, Gene?

Klinger - Who?

Portman - Gene. Do you know him?

Klinger - No, I don't.

Portman - Okay, well. I just wanted to know. He, he also uh, I met him on this trip; I thought you might know him.

Klinger - No.

Portman - I wanted to make sure everything went...

Klinger - I like to know as...

Portman - ...okay with him

Klinger - ...as possible

Portman - Huh?

Klinger - I said I like to know as few people as possible.

Portman - As few people as possible, yeah.

Klinger - As few names as possible...

Portman - Right.

Klinger - I know you, you're good people, you know if anything happened, you wouldn't, you know, you'd try your best not to involve anybody...

Portman - Uh huh

Klinger - And, you know, that's why I thought of you, you don't...

Portman - Okay

Klinger - I knew you needed money, I knew you wanted to escape from Florida and you know, under the wing of your parents and all that kind of shit.

Portman -Right.

Klinger - And you just seemed like a natural.

Portman - Right. So everything's cool out there, huh?

Klinger - Beautiful.

Portman - Okay, good. Maybe I'll, you know, be able to visit you.

Klinger - Yeah, dynamite. We're leaving Monday; we're going to Catalina for about four or five days.

Portman - Oh, that should be nice.

Klinger - I've never been over there. I don't know whether...

Portman - Yeah, I don't know either.

Klinger - ...good...inaudible

Portman - If you ever get a chance, go to Bali.

Klinger - Bali?

Portman - Yeah, it's beautiful.

Klinger - Hmm. They run around half naked there?

Portman - Half naked...laughs...what's the difference, Richard, if they run around half naked?

Klinger - Well, you know it's . it's...

Portman - It's just a nice clean place with beautiful water and uh, you know...

Klinger - Right. A lot of sharks?

Portman - Sh...laughs...there's no sharks, no, no, no no no. Okay, so I just uh...

Klinger - You, you come across some good people where you are? You know, that you're staying with in New York now?

Portman - Yeah, yeah, I've got some real good people in New York.

Klinger - Okay, okay yeah. Uh, yeah your best bet is to, you know try and get in touch with him as rapidly as possible.

Portman - As rapidly as possible. Okay.

Klinger - Get, get rid of that thing and everything will be everything and, and...

Portman - Right and everything, he'll do me solid with the money.

Klinger - Absolutely.

Portman - Yeah, it was really something else, it was really pure, pure, pure. Wow! Unbelieveable!

Klinger - He, he took you first class, didn't he?

Portman - Oh yeah, first class.

Klinger - That's the way he works.

Portman - That's right, first class, the only way to go. Okay so that's 8-8-4-1-2-4-9

Klinger - Inaudible...8-8-4 ...

Portman - 1-2-4-9

Klinger - Yup.

Portman - Okay and thirty nine...

Klinger - If I make contact, hey...

Portman - Yeah?

Klinger - Make contact with them give them my lo...our love. Tell them we've been trying to reach them, but they've been out of town.

Portman - Oh you've been trying to reach them, yeah, boy I I hope he's okay. Cause he w...he was pretty fucked up, I'll tell you the night before he left, Bangkok.

Klinger - Yeah.

Portman - But uh you know, I saw him that morning and uh ; you know, I didn't think he was; I didn't think he was gonna be, you know, holding anything or, or doing any smuggling himself, since I, I you know. I believed, you know he's got a, he's got a sheet or something, right?

Klinger - yeah, well don't, don't...

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Portman - Yeah, no, no, I just, I, but uh you know that's why I hope he's you know, everything's okay with him.

Klinger - yeah, cause otherwise he, he's liable to get shot

Portman - Oh yeah no, no, everything's ...laughs...don't worry. I'm cool.

Klinger - Okay

Portman - Okay, so, so...

Klinger - ...If you're ever in California, you know you could make it by we'd definitely want to see you, okay?

Portman - Right. Okay Richard.

Klinger - See you, my love to...

Portman - Okay, love to you, love to Linda and the kid.

Klinger - Sure will

Portman - Okay, bye bye.

Hangs up

FD-122A (Rev. 10-7-75)

GX 3511G

A 295

U. S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF INVESTIGATION
WASHINGTON, D. C. 20537

TO:

Date 8-19-76

Your inquiry 8-18-76

Drug Enforcement Administration
555 West 57th Street
New York NY 10019

Attn: UID S.A. Falvey

RE: JOSEPH BORIELLO

- [X] Attached furnished in reply to your inquiry.
- [ ] Attached furnished in compliance with request from
- [ ] Only record(s) available attached.
- [ ] This matter is receiving attention and you will be advised at an early date.
- [ ] Supplementing FBI Laboratory report dated
- [ ] Records FBI # are furnished since there is a possibility that one may pertain to the subject in whom you are interested.
- [ ] Fingerprint files fail to disclose

- [ ] Confirming FBI wire of
- [ ] A wanted notice has not been placed as subject appears to be in custody. Clear or cancel (CW or XW) your NCIC record.
- [ ] When you no longer desire your notice maintained, please advise.
- [ ] If you determine subject to be in custody, please advise so that your notice may be canceled.
- [ ] Subject of your inquiry searched in name indices only. Enclosed record(s) possibly identical. If identical, resubmit request and wanted (or flash) notice will be placed.
- [ ] If it is determined that the subject of this record is not the individual in whom you are interested, please advise.
- [ ] Your communication is returned.
- [ ]

[X] Enc.

[ ] Copy to:

Identification Division
FBI

FBI/DOJ

A 296

IDENTIFICATION DIVISION

The following FBI record, NUMBER 819 249 B, is furnished FOR OFFICIAL USE ONLY.

CONTRIBUTOR OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION
Prob Dept Crt of Gen Sess NY NY	Joseph Boriello #68324	1-2-55	inv	
PD NY NY	Joseph Boriello #B-352020	1-3-55	aslt & wobb (guns) 1897 PI	
Reception Center Elmira NY	Joseph Boriello #12019	2-7-55	conf robb 3rd	5-0-0 JT 31 da
Prob Dept Crt of Gen Sess NY NY	Joseph Boriello #--	1-2-55	robb 3rd	
PD NY NY	Joseph Boriello #B 352020	3-26-58	3305 phl (poss heroin)	
PD NY NY	Joseph Boriello #B-352-020	2-13-59	3305 PHL poss heroin & 1747-D poss hypo needle	
NY C Pen Rikers Isl NY NY	Joseph Barriello #102633	2-27-59	3305	6 mos
Pol Hdqrs Yonkers NY	Joseph Vincent Boriello #B-7391	7-13-61	aided in passing forged prescriptions-fel	final charge conspiracy as misd sent 1 y Co Pen on char
SO Valhalla NY	Joseph Vincent Boriello #7134	7-18-61	forg of vio 1889-B PL final charge conspiracy as misd	1 yr West Co P other cts & ot indict dismiss
PD NY NY	Joseph V. Boriello #352020	5-4-62	GL 2nd 1296 PL	
WH Rikers Isl NY	Joseph Boriello #362 729	5-16-62	att PL	4 mos
Westchester Co Jail Valhalla NY	Joseph Boriello #52985	9-11-62	Robb	6mo 1y

Notations indicated by * ARE NOT BASED ON FINGERPRINTS IN FBI files. The notations are based on data furnished this Bureau concerning individuals of the same or similar names or aliases and ARE LISTED ONLY AS INVESTIGATIVE LEADS.

16—70052-1 U. S. GOVERNMENT PRINTING OFFICE

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WASHINGTON, D.C. 2[illegible]

A 297

IDENTIFICATION DIVISION

2

The following FBI record, NUMBER 319 249 B , is furnished FOR OFFICIAL USE ONLY

CONTRIBUTOR OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION
WH Hart Isl NY NY	Joseph Boriello #3853	3-4-64	PL	90 dns
PD NY NY	Joseph Boriello #B352020	10-8-64	1. 3305 PHL-heroin 2. 1747a PL-needle & eyedropper	
Crim Crts City of NY NY NY	Joseph Boriello #6398-XIA-11/4/64	11-4-64	3305 PHL 1747D PL	6 mos
NYC Pen Rikers Island NY	Joseph Boriello #264 5265	11-5-64	pos of narcotics	6 mos
PD Mount Vernon NY	Joseph Boriello #B 6121	7-10-65	vag	guilty plea, susp sent
PD NY NY	Joseph Boriello #352020	8-17-65	1897PL Gun (F)	
NYC Pen Bronx NY	Joseph Boriello #265 4079	10-4-65	weapon	1 yr
[illegible]	[illegible]	8-22-66	1751 PL heroin	
PD NY NY	Joseph Boriello #352020	11-14-66	GL auto	

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Information shown on this Identification Record represents data furnished FBI by fingerprint contributors. Where final disposition is not shown or further explanation of charge is desired, communicate with agency contributing those fingerprints.

Notations indicated by * are FBI breaks on fingerprints in FBI files but are listed only as investigative leads as being possibly identical with subject of this record.

A 298

IDENTIFICATION DIVISION

The following FBI record, NUMBER 819 249 B , is furnished FOR OFFICIAL USE ONLY.

CONTRIBUTOR OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION
Crim Crts City of NY NY NY	Joseph Boriello #M/B7905/66	12-6-66	1751 to 3305 PHL poss of drugs	
NYC Recept & Class Center East Elmhurst NY	Joseph Boriello #367-178	1-9-67	3305 (Heroin)	6 mos
St Bu Sacramento Calif	Joseph Vincent Boriello #3231177	6-20-67	Registrant Narco	

Information shown on this Identification Record represents data furnished FBI by fingerprint contributors. Where final disposition is not shown or further explanation of charge is desired, communicate with agency contributing those fingerprints.

Notations indicated by * are NOT based on fingerprints in FBI files but are listed only as investigative leads as being possibly identical with subject of this record.

Courts
EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.

.BERT EINSTEIN COLLEGE OF MEDICINE
OF YESHIVA UNIVERSITY
MORRIS PARK AVENUE, BRONX, N.Y. 10461 CABLE: EINCOLLMED N.Y.

Mailing Address
BRONX PSYCHIATRIC CENTER
1500 WATERS PLACE
BRONX, NEW YORK 10461

FPI-81—12-8-76-1B-4648

ble Judge Robert Carter
Federal District Judge for the Southern District of New York
Foley Square
New York, New York

Re: U.S. v MADONNA
76 cr 846 R.L.C.

Honorable Sir:

Enclosed herewith please find certain Program records which relate to the attendance of one Joseph Boriello at the Albert Einstein College of Medicine Methadone Maintenance Treatment Program during the last two (2) weeks in April and the first (1st) week in May 1976. They are as follows:

1. Doctor's Order Sheet covering the period March 2, 1976 to May 6, 1976.

2. Record of Patient Contact (Counseling Notes) covering the period January 1, 1976 to May 6, 1976.

These documents were not brought to your attention pursuant to subpoena and the Court Order of November 12, 1976, due to our belief that only Program records directly related to the attendance of the witness were requested. Since the hearing of November 12, 1976, defense attorneys and their investigators have exhibited an inordinate interest in "anything" which might serve to impeach the credibility of the witness. We, therefore, have searched for secondary sources which we now produce even though neither of the above documents speak directly to the issue of attendance during the time in question. However, in each case, the recorder is able to infer that the witness was probably present.

A 300

With regard to the Doctor's Order Sheet, the pharmacist who recorded the change in methadone dosage on May 2, 1976, pursuant to doctor's order of April 27, 1976, can state that, as a matter of Program pharmacy procedures, such an order and change does not occur without direct communication on the part of the patient and, therefore, Mr. Boriello must have been present.

With regard to the Record of Patient Contact, the counselor is prepared to state that, as a matter of regular Program Counseling procedure, entries are made indicating patient vacation or travel medication requests as well as instances of missed medication. Mr. Boriello's record is silent as to these matters and, therefore, his counselor concludes that he must have present.

I have been advised that neither of these Program employees is able to directly recall whether or not Mr. Boriello was in fact present during the time frame of interest to defense counsel.

Since the hearing, the Program and its staff have been the object of polite, but incessant questioning by defense attorneys and their investigators. On one occasion, an investigator was found in the pharmacy which is clearly in violation of both Federal and State Law. We, therefore, request that you instruct them to restrict their contact to the Court rather than to the Program and to refrain from further ex-parte inquiries.

We, will, of course, respond to any further inquiry the Court may have with regard to this matter, although, to my knowledge, we possess no additional information or records.

I may be reached at 430-3347 or 233-4023.

Sincerely,

Laurence K. Brown

Assistant to the Director
and Counsel- Methadone
Maintenance Treatment
Program

LB:pt
Enc.

A 301

ALBERT EINSTEIN COLLEGE OF MEDICINE
METHADONE MAINTENANCE TREATMENT PROGRAM
BRONX STATE HOSPITAL

30366

A-Administered
T-Transferred to Bx.
R-Request made
D-Discontinued

WARD:

HOSPITAL#:

NAME:

DOCTOR'S ORDER SHEET

DATE	ORDERED BY WHOM	LABORATORY ORDERS MEDICATION-DIETS ETC.	DISPOSITION ACTION A T R D	BY WHOM
3/2-76		ORDER OF 3/1-76 — DOSE TO COMMENCE ON 3/2-76 WILL BE STARTED INSTEAD ON 3/3-76 — PT. HAD BEEN MEDICATED PRIOR TO COMMENCEMENT DATE DOSE = 60mg		
			3/4/76 1 bottle 60-mg	
			3/8/76 - 60mg	
3-19-76		Methadone 50 mg PO		
			3/15/76 - 50mg	
3-22-76		Methadone 40 mg PO	3/23/76 - 50mg	
3-29-76		Methadone Brought PO	3/29/76 - 40mg	
4-5-76		Methadone 30 mg PO	4/5/76 - 35mg	
4-12-76		Methadone 25 mg PO	4/13/76 - 25mg	
4-19-76		Methadone 20 mg PO	4/19/76 - 20mg	
4-22-76		Methadone 15 mg PO	4/22/76 - 4/25/76 → 15mg	
4-26-76		Methadone 10 mg PO	4/26/76 → 10mg	
4-29-76		Methadone 5 mg PO	4/29/76 → 5mg	
5-2-76		stop above detox		
		Pt. started detox on 4/27/76 at 10mg PO daily 4/28/76 - 20mg		
5-6-76		Methadone 30 mg PO		

A 302

ALBERT EINSTEIN COLLEGE OF MEDICINE
METHADONE MAINTENANCE TREATMENT PROGRAM

MELROSE O.P.D.

BEHAVIORAL NOTES - MM

NAME: Joseph Borrello PROG.# _____ O.P.D. Thursday

ADM. PROG. 12/29/75 ADM. OPD 1/1 COUNSELOR B. Hanson

DATE	RECORD OF PATIENT CONTACT OR INFORMATION ABOUT PATIENT
1/28/76	Patient complaining of abdominal pains and was informed that he needed surgery. Pt was also asked talking about detoxing. He was asked stabilized on methadone. Bn
2/4/76	Pt is presently on detox by his own choice. He is on a special diet for gall stones. He will be put on detox and received Codeine for pain. Bn
3/30/76	Pt still losing weight from his medical problem (gall stones). He expects to be called any day for a bed at Montefiore. Bn
4/16	Pt argued last week to continue his methadone. He is still losing weight. Has received no offers. Pt is unable to take them due to physical condition. Bn
5/6/76	Pt requested medication to visit his grandmother in Italy. Forms sent on Monday. Bn

STATE OF NEW JERSEY: ss

COUNTY OF ATLANTIC :

A 303

STEPHEN C. DELANEY, being of full age and duly sworn according to law upon his oath deposes and says:

1. I, Stephen C. Delaney, a private investigator in the State of New Jersey, was assigned by Attorney Raymond A. Brown, of Jersey City, New Jersey, to interview knowledgeable persons about the procedure and records at the Albert Einstein College of Medicine Methadone Maintenance Treatment Program, Bronx State Hospital, relative to the dispensing of methadone.

2. On November 29, and November 30, 1976, I interviewed James Clare, registered pharmacist in charge of the pharmacy for the above program, at the Bronx State Hospital on the sixth floor.

3. On November 30, 1976, I interviewed Joseph Hecht, also a registered pharmacist at the same location.

4. I examined on the above dates records pertaining to Joseph Borriello, that in the opinion of Joseph Hecht, indicate Borriello was at the above location and received methadone during the last week of April and the first week of May. These records are described in the following paragraphs.

5. The Doctor's Order Sheet (total of three) gives a history of the daily dosage ordered for Mr. Borriello. The same sheets contained hand writing of Mr. Hecht indicating to him that he followed the dosage instructions, including one by telephone from Dr. Gotsis on April 27, 1976. This phone call changed the dosage from 10 mgs. to 20 mgs. This nessecitated the voiding of the dosage poured by Mr. Hecht pursuant to the April 26, 1976 order. He explained to me that the Doctor's orders were made out in advance. He would pour and label for each patient in advance and dispense as the patient came in. In Borriello's case the Doctor's Order Sheet indicates he was O.D. which meant he had to pick it up every morning. There was a pick up list posted on the wall which I examined and it indicated Borriello was to pick up Monday, Tuesday, Wednesday, Thursday and Friday. That list was dated April 2, 1976. According

to Mr. Hecht and Mr. Clare, that list is considered current.

6. Whenever a methadone dosage was voided it was listed on a "Voided Medication" list. In checking the Voided Medication list for the last week in April and the first week in May, 1976, Borriello's name appeared and the voided dosages coincided with the dates that the dosage was changed on the Doctor's Order Sheet. Mr. Hecht in reviewing these records stated that based on his experience at the pharmacy for approximately five years and his knowledge of these and other records, Mr. Borriello was at the Clinic each day during the last week in April and the first week in May.

7. Mr. Hecht was on vacation on the Friday in November that the court called for the records from the Clinic. He came in to pick up his pay check and was called by Ira Marion and Mr. Kauffman at the Clinic and was questioned as to whether he remembered Mr. Borriello being there in April. They did not show the records submitted to the court nor did they ask him if he knew of any record that would establish whether or not Borriello was present for the time questioned.

8. The procedure for dispensing methadone that I observed on November 30, 1976, is as follows: The patient comes to the pharmacy door (Dutch Door), the pharmicist identifies the patient, gets the dosage from a walk in cooler near the door, checks a record on the desk, writes the dosage dispensed on a legal pad, observes the patient consume one container, takes the empty back, and if the re-cap sheet indicates the giving of up to three doses it is done at that time. If not, the patient only gets the one dosage to be consumed on the spot. On the wall next to this half opened Dutch Door where the patient received the medication is posted a governmental memo dated April 4. 1976, that indicates no more than three doses can be dispensed without the approved form called the Exception Form filed in the patient's records. This was a New York Drug Abuse Control Commission memo.

9. Mr. Clare stated that Mr. Marion or Mr. Kauffman questioned him as to why some records indicated Borriello was at the Clinic on the days in question and an exception had been granted to him for a proposed trip during the same time period. Mr. Clare stated further that he replied it cannot be both ways. Under normal conditions he would consider the re-cap sheet accurate but for the period in question he could not guarantee the accuracy. In my interview of Mr. Clare he told me he was an assistant to the Administrator during the month of April and May, and consequently, would leave the pharmacy some time in the morning and be gone on many occasions all day. During his absence Mr. Hecht was the senior registered pharmacist. During the same time period James Adams, William Craig and Enrico Arista-Salado worked in the pharmacy and dispensed medication.

10. Mr. Clare, whenever he circled the re-cap sheet after dispensing methadone to a patient would initial the circle. Mr. Hecht never initialed his circles, and to this day does not. In examining re-cap sheets the initials of Clare, Adams and Salado appear throughout. The circles without initials are by far more numerous. Mr. Hecht feels that many of the circles throughout the re-cap sheets are his becuase of the habit of the others named above to put their initials on it. Mr. Clare stated it is possible that Mr. Craig did not initial because he was not a registered pharmacist.

11. The Doctor's Order Sheet I examined contains the following dates indicating Dr. Gotsis issued an order for Joseph Borriello.

April 5, April 12, April 19, April 22, and April 26 (hand-written notation by Mr. Hecht on April 27, per phone call)

May 2, May 6, (hand-written notation by Mr. Hecht for May 3, and May 10.

Mr. Hecht, reading from the above records, indicated that the April 29, and May 2, Doctor's orders were not carried out because of the April 27, telephone order which countermanded those two orders. This indicates to Mr. Hecht that he spoke to Dr. Gotsis before giving Mr. Borriello the 20 mgs. dosage instead of the 5 mgs. dosage that the original order for the last week in April indicated. For the first week in May, the record indicates 20 mgs. each day where ordered whereas the original order for the week called for no medication to be dispensed. On May 6, the medication was increased to 30 mgs. Based on Mr. Hecht's experience this means the Doctor was seeing and/or conversing with Borriello during this time period. In the absense of indications to the contrary on the Voided Medication sheet, the records indicated Mr. Borriello received the above described dosage the last week of April and the first week of May.

12. Attached to this affidavit is a blank Doctor's Order Sheet and a blank Void Medication Sheet.

STEPHEN C. DELANEY

Sworn to and subscribed to
Before me this day of
1976.

LISA LAMPERT
My Commission Expires August 12, 1981

conviction be entered in the judgment role in this case, in the interests of justice, under Rule 33 --

THE COURT: You say safe?

MR. HUGHES: Yes, s-a-f-e. I mean safe in the interests of the morality of the system.

THE COURT: I understand now. I didn't get you.

MR. HUGHES: For those particular reasons, and the combined fashion in which they express the concept of Rule 33, in the interests of justice I move that a new trial should be ordered at this juncture and the defendant spared the expense, the delay, and the harassment of securing a reversal as we hope on appeal.

MR. BLOSSNER: If your Honor please, I have perused the undated letter from the Albert Einstein Institute received by your Honor on December 9th, and was sent to you by Lawrence K. Brown, Assistant to the Director and Counsel of the Methadone Maintenance Program.

If your Honor will remember from the course of the trial I had personally caused a subpoena to be served on that institution for all relevant material that would establish that Mr. Boriello was in fact in the New York area during the period in which he said that he was overseas in Bangkok prior to his receiving a passport in his own

name on May 12th.

That material was introduced, was delivered to the Court and introduced in evidence by Mr. Brown on behalf of the defendant Larca and joined in by the defendant Madonna and by the defendant Klinger.

Subsequent to Mr. Flannery's summation that material was taken out of evidence when a Mr. Ira Marion made a statement to the Court in Court's chambers.

We spoke to Mr. Marion. Mr. Marion evidently urged the Court that that material was unreliable. Subsequently, this letter would indicate that there is nothing within the records of that center that could in fact establish that that material was unreliable.

I am reading from page 1, after Mr. Brown goes through the material that he is sending theCourt. He says, "However, in each ase the recorder is able to infer that the witness" -- he is speaking of Mr. Boriello -- "was probably present."

On page 2, the first paragraph goes on: "With regard to the doctors' order sheet the pharmacist who recorded the change in methadone dosage on May 2, 1976, pursuant to doctors' order of April 27, 1976, can state that as a matter or program pharmacy procedures such an order and change does not occur without direct communciation on the

part of the patient, and, therefore, Mr. Boriello must have been present."

They are talking then of April 27th and May 2nd.

The next paragraph goes on:

"With regard to the record of patient contact, the counsellor is prepared to state" -- we understand, your Honor, that the counsellor would be Mr. Marion's wife, Mrs. Marion, who is the personal counsellor of Mr. Boriello -- I will go on: "With regard to the record of patient contact, the counsellor is prepared to state that as a matter of regular program counseling procedure entries are made indicating patient vacation or travel medication requests as well as instances of missed medication. Mr. Boriello's record is silent as to these matters, and, therefore, his counselor concludes that he must have been present."

I will skip past the rest of the letter, your Honor, and point to the further sheets that are supplied over and above the sheets which we entered into evidence.

The doctors' order sheet for Mr. Boriello himself -- if you remember, the Court was afforded a computer printout sheet of most of the patients, most of them crossed out, and only Mr. Boriello's name shown.

This is his personal doctor's order sheet which indicates on 4-26, April 26th, methadone was prescribed for him by a doctor.

We understand that this is pursuant to his being examined by a doctor. I believe it says ten milligrams.

Then again 4-29, April 29th, there is another indication that there is a methadone prescription of five milligrams. This indicates that the patient was being weaned down in the amount of methadone he was taking, and necessarily being examined by a doctor in the interim portion.

There is also an indication on that same sheet that on May 6, 1976, the patient was also seen, and it was jumped up to 30 milligrams of methadone. That is, his prescription was increased.

Turning to the next page, also by the Institute, this is behavioral notes. Once again this sheet only refers to Mr. Joseph Boriello, and shows that his counselor was B. Marion, who we have come to understand is the wife of Mr. Marion, who told you that the records which were in evidance were inaccurate.

THE COURT: I have read the report.

MR. BLOSSNER: These records indicate May 6th: "patient requested medication to visit his grandmother in

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Italy. Form sent out Monday."

If your Honor will remember, there was a request to the federal agency to require that methadone in excess of three days, permission for such methadone to be given to a patient has to be applied for through a federal agency.

Mrs. Marion now refers to her own sending out of this letter on a Monday, and it is dated May 6th. Therefore, the letter sent to the Court, and which Mr. Brown did not allow myself or our investigators, Mr. Alch, or Mr. Brown's investigators, to look at, and the material that was not supplied to the Court pursuant to our subpoena, would indicate that Mr. Boriello was in New York during this period prior to receiving the passport from the government when he stated he was in Bangkok.

For those reasons I would first ask that this letter and the attachments be placed into the court record at this time.

For those reasons we would once again ask for a new trial.

Your Honor, could we obtain copies of this material that was sent to the Court? This was our first chance to look at it just a few moments ago.

MR. FLANNERY: Could I look at it for a few

moments, and then I will be prepared to make my brief remarks.

THE COURT: Yes.

(pause.)

MR. FLANNERY: Let me address myself first to the question of the records maintained by the Einstein College of Medicine.

I only want to quote a short portion of this letter addressed to the Court:

"We have searched for secondary sources which we now produce even though neither of the above documents speak directly to the issue of attendance during the time in question. However, in each case the recorder is able to infer that the witness was probably present."

I emphasize the word "probably," and the Institute's own statement that "neither document speaks directly to the issue of attendance."

The testimony -f Mr. Marion in your robing room, your Honor, towards the conclusion of the trial was that these records "in no way reflect reliable dates and are used essentially for billing possible third party payers such as Medicaid. The dates were just circled arbitrarily."

That is found at page 1845 of the trial

transcript.

The government's memo cites Rule 803, Subsection 6, as a reason to not permit the introduction of business records with "lack of trustworthiness."

The government submits the original decision by the Court to preclude the admission of these documents based, as I understand it, on that still is applicable.

Further, if I understand the argument made by counsel, he states these records can be read to say that Mr. Boriello was definitely here on April 27th and May 2nd.

I direct the Court's attention to the trial minutes at 242, where Mr. Boriello on cross examination testified th-t he was in New York toward the end of April, the beginning of May.

And so that for the purposes of precluding them as business reocrds for lack of trustworthiness, I direct your attention to that particular rule, and as to what effect they would have, if any, on the trial it appears if anything they would corroborate the witness, Mr. Boriello, as reflected in the trial testimony.

The other issues which were referred to by counsel I will go through briefly.

On the question of publicity, it is difficult

A 313a

ALBERT EINSTEIN COLLEGE OF MEDICINE
OF YESHIVA UNIVERSITY
JS PARK AVENUE, BRONX, N.Y. 10461 CABLE: EINCOLLMED, N.Y.

METHADONE MAINTENANCE
TREATMENT PROGRAM

Mailing address
BRONX STATE HOSPITAL
1500 WATERS PLACE
BRONX, NEW YORK 10461

DATE: May 6, 1976

Dr. Seymour Joseph
Deputy Commissioner
Methadone and Pharmaceutical Control
N.Y.S. Drug Abuse Control Commission
2 World Trade Center
New York, New York 10047

RE: EXEMPTION FROM F.D.A. REGULATIONS

Patient's Initials: J.B.
Patient's ID.#: 30306
Clinic Number: NY 10 226M
Clinic Address: 1500 Waters Pl.
Bronx, N.Y. 10461

Dear Dr. Joseph:

Above named patient has been with our M.M.T.P. since 12-29-75 and has made satisfactory progress and has made remarkable progress since admission. There has been no drug abuse and pt. is extremely responsible. At present, he/she is on Methadone 30 mgs. daily.

We are requesting an exemption to dispense Methadone for 21 days because: his family is taking him to Italy to visit his ailing grandmother. He will be leaving on May 12 and will return on June 2. All the staff is in agreement that this patient be allowed to travel to Italy. Patient may not have this opportunity to see his grandmother again.

Sincerely,

C. Gotsis M.D.
CLINIC DIRECTOR

CMD: 226M Trailer 1

ADDRESS: 1500 Waters Place Bronx, N.Y.

cc: Mr. Buddy Stonecipher - F.D.A.
M.M.T.P. Pharmacy
Patient's Chart

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A 313b

COMMUNITY TREATMENT FOUNDATION
CLINIC #255 PATIENT VISIT REPORT FOR THE MONTH OF MAY 1976

PAGE

ID #	PATIENT'S NAME	BIRTH DATE	MEDICAID NUMBER	DATE(S) OF VISIT(S)
[redacted]				

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A 313c

COMMUNITY TREATMENT FOUNDATION
CLINIC [illegible] PATIENT VISIT SUMMARY FOR THE MONTH OF APRIL 1970

| [illegible] | PATIENT'S NAME | BIRTH DATE | MEDICAID NUMBER | DATE(S) OF VISIT(S) | [illegible] | [illegible] | [illegible]

A 313d

May 14, 1976

To whom it may concern:

RE: Joseph Boriello
Treatment #30366

This is to verify that the above named is a patient currently under treatment at the Methadone Maintenance Treatment Program of Albert Einstein College of Medicine of Yeshiva University. Mr. Boriello is properly authorized to have in his possession 21 bottles of methadone medication which has been prescribed for him in conjunction with his treatment on our program. The medication is prescribed from May 16 to June 6, 1976. It is to be taken orally, one bottle per day, as directed.

Permission to travel has been granted by the Methadone Monitoring Unit of the United States Food and Drug Administration and the Division of Pharmacological Control of the New York State Office of Drug Abuse Services.

Should any problems arise, please do not hesitate to contact me immediately at (212) 430-3203.

Sincerely,

Constantine C. Gotsis, M.D.
Deputy Medical Director

CCG:cdm

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JUDGMENT AND COMMITMENT

UNITED STATES DISTRICT COURT
For The
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	)	
	)	
-v-	)	
	)	No. 76 Cr. 846 R.L.C.
MATTHEW MADONNA a/k/a	)	
	)	
PAUL DE ROBERTIS	)	

In the presence of the attorney for the government the defendant appeared in person on this date, 12-21-76, with counsel Gerald Alch, Esq., Graham Hughes, Esq., and Robert Blossner.

There being a verdict of guilty on counts 1 & 2, defendant has been convicted as charged of the offense(s) of unlawfully, wilfully, intentionally and knowingly, combined, conspired, confederated, and agreed together with others to violate Sections 812, 841(a)(1) 841(b)(1)(A) and 952(a) of Title 21, United States Code. It was part of said conspiracy that the defendant would import into the United States from other countries and distribute and possess with intent to distribute Schedule I narcotic drug controlled substances the exact amounts being 32.4 grams of heroin and the rest being unknown to the Grand Jury. (Title 18, United States Code, Sections 846). T.21 U.S. Code, Section 812, 841(a)(1) § 841(b)(1)(A). The court asked whether defendant had anything to say why judgment

should not be pronounced because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIFTEEN (15) YEARS on count 1 and the defendant is fined $25,000 on count 1, the defendant is ordered to stand committed until the fine is paid or he is otherwise discharged according to law. FIFTEEN (15) YEARS on count 2 and the defendant is fined $25,000 on count 2, the defendant is ordered to stand committed until the fine is paid or he is otherwise discharged according to law. Sentence on Count 2 is to run CONSECUTIVELY to sentence on Count 1. Total Fine to be $50,000. Pursuant to the provisions of Title 21, United States Code, Section 841, the defendant is placed on special parole for a period of THREE (3) YEARS to commence upon the expiration of confinement.

DOCKETED AS
A JUDGMENT # 77, 122
ON Dec. 28, 1976

/s/ ROBERT L. CARTER
United States District Judge

/s/ RAYMOND F. BURGHARDT
Clerk

JUDGMENT AND COMMITMENT

UNITED STATES DISTRICT COURT
For The
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	)	
	)	
-v-	)	No. 76 Cr. 846 R.L.C.
	)	
SALVATORE LARCA,	)	

In the presence of the attorney for the government the defendant appeared in person on this date, 12-21-76, with counsel Raymond A. Brown, Esq.

There being a verdict of guilty on counts 1 & 2, defendant has been convicted as charged of the offense(s) of unlawfully, wilfully, intentionally, and knowingly, combined, conspired, confederated, and agreed together with others to violate Sections 812, 814(a)(1), 841(b)(1)(A) and 952(a) of Title 21, United States Code. It was part of said conspiracy that the defendant would import into the United States from other countries and distribute and possess with intent to distribute schedule I narcotic drug controlled substances the exact amounts being 32.4 grams of heroin and the rest being unknown to the Grand Jury. (Title 18, United States Code, Section 846). (Title 21, U.S.C. Sections 812, 841(a)(1) & 841(b)(1)(A). The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown or appeared to the court, the court adjudged the

defendant guilty as charged and convicted and ordered that: The defendant be hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIFTEEN (15) YEARS on count 1. FIFTEEN (15) YEARS on count 2, to run concurrently with sentence on count 1. Pursuant to the provisions of Title 21, United States Code, Section 841 the defendant is placed on special parole for a period of THREE (3) YEARS, to commence upon the expiration of confinement.

U.S. DISTRICT COURT
FILED
DEC 21 1976
S. D. OF N. Y.

/s/ ROBERT L. CARTER
United States District Judge

/s/ RAYMOND F. BURGHARDT
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA Respondent	76 Cr. 846 (R.L.C.)
-v-	NOTICE OF APPEAL
Matthew Madonna, Appellant	

SIRS:

PLEASE TAKE NOTICE that Matthew Madonna, the defendant in the above captioned matter, hereby appeals to the United States Court of Appeals for the Second Circuit from the judgment of conviction entered in this action on the 21st day of December, 1976.

Dated: New York, New York
December 29, 1976

Graham Hughes

GRAHAM HUGHES
Attorney for Appellant Madonna
New York University School of Law
40 Washington Square South
New York, N. Y. 10012
(212) 598-2565

TO: Clerk
United States District Court
Southern District of New York
Foley Square
New York, New York

Hon. Robert B. Fiske, Jr.
United States Attorney
Southern District of New York
1 St. Andrew's Plaza
New York, N.Y.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -x

UNITED STATES OF AMERICA, :

-v- :

SALVATORE LARCA, et al., :

Defendants. :

- -x

NOTICE OF APPEAL

76 Cr. 846

The defendant, Salvatore Larca, hereby appeals to the United States Court of Appeals for the Second Circuit from the Judgment and Commitment entered against him on December 21, 1976

DATED: New York, New York
December 22, 1976

YOURS, etc.

HOFFMAN POLLOK MASS & GASTHALTER
BY: John L. Pollok
Attorneys for Defendant Larca
477 Madison Avenue
New York, New York 10022
(212) 688-7788

TO: Salvatore Larca
Metropolitan Correctional Center
150 Park Row
New York, New York

United States Attorney
Southern District of New York
One St. Andrews Plaza
New York, New York

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Recd. 2/14/77
By: M. Rottenberg
for L. B. Sedowick
Chief Appellate Atty

THE ALPERT PRESS INC., 644 PACIFIC ST. BKLYN., N. Y.